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No. 95-_____

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1995

E.R. MYERS, Warden, et al., *Petitioners*

v.

GREGORIO JIMINEZ, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

After this Court denied California's first petition for certiorari in this case, the United States Court of Appeals for the Ninth Circuit filed an amended opinion which was more injurious than its first opinion. Specifically, in its amended opinion, the Ninth Circuit invented a new doctrine called the "de facto Allen charge." Moreover, although the Ninth Circuit has now filed two opinions in this case, it has not felt compelled to address the Teague question raised by California in either one.

The question presented is:

Whether the Ninth Circuit's new explanation for its grant of relief amounts to a "new rule" of law that cannot be applied retroactively to invalidate the state judgment.

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PETITION FOR WRIT OF CERTIORARI

The State of California hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

After this Court denied California's petition for writ of certiorari on October 3, 1994, the Ninth Circuit amended part II of its original published opinion. The amended published opinion, Gregorio Jimenez v. E.R. Myers, Warden, No. 91-56476, filed on October 28, 1994, is attached as Appendix A. The original opinion, filed on December 8, 1993, is attached as Appendix C.

JURISDICTION

The original judgment of the United States Court of Appeals for the Ninth Circuit was entered on December 8, 1993. That Court denied a timely petition for rehearing and suggestion for rehearing en banc on January 20, 1994. App. D. On October 28, 1994, the United States Court of Appeals filed an amended opinion; a timely petition for rehearing and suggestion for rehearing en banc was denied on February 21, 1995. App. B.

The jurisdiction of this Court is invoked

pursuant to Title 28, United States Code, section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunitites of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28 of the United States Code, section 2254(a) provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

Respondent Gregorio Jimenez shot Leticia Trovao twice after she rejected his proposal of marriage. Leticia suffered a collapsed lung as a result of the shooting.

Respondent's trial for attempted murder was by jury. The case was submitted to the jury on November 3, 1988, at 9:15 a.m. CT 118. After hearing readback testimony for one hour and deliberating for only two hours and

forty-five minutes, the jury sent a note to the court which said, "We are unable to reach a verdict, and feel strongly that we would not be able to reach a verdict." CT 123, App. F.

At 4:34 p.m., the jury, at the request of the court, returned to the courtroom where the following colloquy between the judge and foreperson occurred:

> THE COURT: For the record, we're now in the presence of all the jurors. . . Mrs. Clingan . . .[¶] . . . You're the foreperson, correct?
>
> THE FOREMAN: Yes.
>
> THE COURT: You have given us a note indicating [sic] unable to reach a verdict.
>
> [¶] What I would like to do is make a couple of general inquiries only of you in a general way, no specifics. [¶] It's been just a little over an hour from the time that the readback was had until you

sent your note to me. You've been out roughly one day now deliberating. [¶] What I would like to know, how many votes have been taken?

THE FOREMAN: Five or six.

THE COURT: Without telling me which direction, just numerically, how did it start, and what was it on the last?

THE FOREMAN: . . . To the best of my recollection, it started out about maybe seven to five, eight to four. Went to nine to three. All right. To back up, this morning, nine, two, and one.

THE COURT: It's gone to one now?

THE FOREMAN: Eight to four, nine to three?

THE COURT: If you can recall, just generally the voting.

THE FOREMAN: This afternoon though,

nine to three.

THE COURT: All right. So you did have - How about in between, nine-two and one and then the nine-three, has there been movement one way or the other?

THE FOREMAN: Nine-one-two, I would say at this point. And yes, there has been some movement in one direction.

THE COURT: Okay. Well, that's what's important to me because of the nature of the type of case. I want to find out that there has been movement. [¶] It will be my intent at this point in time, based upon what I've heard so far, what's happened so far, is to allow you to leave at this time for the weekend. I know that Mr. Davis has his problem with his airline tickets, but I'm going to ask that you come

back on Monday morning at 9:00 o'clock for deliberation at least for the morning to see if we have any further movement because that will [be] my intention at this time. . . II RT 439-441.

On November 7, 1988, at 9:00 a.m., after a long weekend, the jury resumed deliberations. After 17 minutes the jury foreman sent a note to the court asking for "a written copy of the law as it pertains to this case, as well as jury instructions as it pertains to this case." CT 131. Closing arguments of both counsel were also requested by the jury. CT 132. The court sent the jury instructions back into the jury room but ultimately denied the request for rereading of counsel's closing arguments. Deliberations continued until noon. CT 132.

Following an hour and a half lunch break, the jury reconvened and resumed deliberations. CT 132. At 2:03 p.m., the court received a

note from the jury requesting further directions because of impasse. CT 133. At 2:35 p.m., the jury reentered the courtroom where the following colloquy between the judge and foreperson occurred:

> THE COURT: . . . I've received your note. 'We are at an impasse and request further direction.' Is that still the posture of the jury?
>
> THE FOREMAN: Yes.
>
> THE COURT: Okay. Now, last Friday I inquired of you as to whether or not there had been any movement by the jury. [¶] So I'll ask that same question again with the understanding, all I want is numbers, not which direction that you're at. How many votes have you taken since last Friday?
>
> THE FOREMAN: Two or three. Two.
>
> THE COURT: Two more?
>
> THE FOREMAN: Uh-huh.

THE COURT: What's the latest?

THE FOREMAN: Eleven-one.

THE COURT: So there has been, then, substantial movement since the last time.

THE FOREMAN: Yes.

THE COURT: All right. Due to the fact we have had that type of movement, I would request, then, to finish rest of today and see where we are at that point in time. All right? Okay. We'll see you back. Have you taken your afternoon break yet?

THE FOREMAN: No, we haven't. II RT 448-449.

Out of the presence of the jury, defense counsel moved for a mistrial. The trial court determined the jury's progress since the previous day of deliberation and the emotional tenor of the case warranted two more hours of additional deliberation. If the jury was

deadlocked at 4:30 p.m., the court was prepared to declare a mistrial. II RT 450-451. Between 4:25 and 4:30 p.m., the jury returned a guilty verdict to the charge of attempted murder. CT 125.

Respondent Jimenez was subsequently sentenced to ten years in state prison. CT 141-142. The California Court of Appeal, Fourth Appellate District, Divsion Two, affirmed the conviction. App. F. A petition for review was denied by the California Supreme Court.

Respondent Jimenez then filed a petition for writ of habeas corpus in the United States District Court. The District Court denied the writ. App. E. On December 8, 1993, the United States Court of Appeals for the Ninth Circuit, in a published opinion, reversed the District Court's order denying habeas corpus relief. The three-judge panel voted two to one, with a very strong dissent by Circuit Judge Kozinski. App. C.

On December 22, 1993, California filed a petition for rehearing and suggestion for rehearing en banc. On January 20, 1994, the Ninth Circuit denied that petition. The Court, on its own motion, stayed issuance of the mandate pending further order from the Court.

On April 20, 1994, California filed a petition for writ of certiorari in this Court. In that petition, California presented two questions: 1) whether the Ninth Circuit had the authority to impose its own rule upon California's criminal procedure for dealing with deadlocked juries; and 2) whether the Ninth Circuit's ruling applied a "new rule" for the first time on collateral review pursuant to Teague v. Lane, 489 U.S. 288.

On May 18, 1994, on its own motion, the Ninth Circuit ordered Jimenez to respond to the petition for rehearing and suggestion for rehearing en banc which California had filed on December 22, 1993, and which the Ninth

Circuit had denied on January 20, 1994.

On October 3, 1994, this Court denied California's petition for writ of certiorari.

On October 28, 1994, the United States Court of Appeals for the Ninth Circuit amended part II of its opinion. In the amended opinion, the Ninth Circuit went beyond its earlier statement that "Allen charge cases are relevant."[1] App. C. In its amended opinion, the panel held that "the trial court's comments and conduct amounted to giving the jury a 'de facto Allen charge,' which instructs the jurors to work towards unanimity and the minority to reexamine its views." The panel equated the trial court's "failure to counterbalance the implication of its questions and comments by instructing the hold-out juror not to surrender his or her sincere convictions" with the failure to supplement an Allen charge with a cautionary

---

1. Allen v. United States, 164 U.S. 492 (1896).

instruction. The panel concluded "from all the circumstances" that the trial judge impermissibly coerced a unanimous verdict and denied Jimenez a fair trial. App. A.

Circuit Judge Kozinski again wrote a sharp dissent. Circuit Judge Kozinski stated, "The majority has made a bad situation worse. In its earlier opinion, it merely held that `our Allen charge cases are relevant.' Today, it invents a whole new doctrine - the `de facto Allen charge.'" Circuit Judge Kozinski further stated:

> With all due respect to my colleagues, this is sheer phantasy. What happened here is *nothing* like giving an Allen charge, where the trial judge explicitly exhorts jurors to try to achieve unanimity. The idea that we can piece together a de facto Allen charge from a trial judge's questions and comments, none of which exhorts the jury to do

anything at all, is far more novel and far more dangerous than what the majority said the last time around. Teague v. Lane, 489 U.S. 288 (1989), is clearly implicated. App. A.

On February 21, 1995, the Ninth Circuit denied California's petition for rehearing and suggestion for rehearing en banc. App. B. On March 9, 1995, the Ninth Circuit granted California's motion for stay of the mandate.

REASONS FOR GRANTING THE WRIT

A. INTRODUCTION

The Ninth Circuit wrote two opinions in this case, and did not feel compelled to address the Teague question in either one. App. A, C. This fails to comport with the express demand of this Court, that courts are to consider the Teague question as the threshold question in every habeas case.

The Ninth Circuit's failure to address Teague before considering the merits of Jimenez' claim was particularly injurious to

California, because the Ninth Circuit announced a new rule in this case. Specifically, the Court placed a new condition upon California's use of numerical inquiries to deadlocked juries, by ruling that a neutral numerical inquiry will become a "de facto Allen charge" unless it is accompanied by a second cautionary instruction. Since the decision in this case imposed a new obligation on California jurists, and since the result was not dictated by precedent existing at the time Jimenez' conviction became final, California submits the Ninth Circuit clearly announced a new rule in this case.

Rather than acknowledge that it had announced a new rule, the Ninth Circuit classified its conclusion as simply the result of an application of the totality of the circumstances test. App. C. If the Ninth Circuit had followed the mandate of this Court and addressed the Teague issue first, however, it could not have disguised its new rule

behind the totality of the circumstances test.

As it stands, the Ninth Circuit has ignored the mandate of this Court and the "new rule" principle, which validates reasonable, good faith interpretations of existing precedents made by state courts. Graham v. Collins, ___ U.S. ___, 113 S. Ct. 892, 897, 122 L. Ed. 2d 260 (1993).

As noted by Circuit Judge Kozinski in his original dissent, "this ruling bodes ill for countless convictions in California and other states that follow the California practice." Appendix C. The validity of state convictions are at stake.

B. ARGUMENT

THE COURT OF APPEALS WAS REQUIRED TO ADDRESS THE TEAGUE ISSUE BEFORE CONSIDERING THE MERITS OF JIMENEZ' CLAIM

Time and again, this Court has held that a "new rule" of constitutional law, or even a settled rule applied in a novel setting, cannot work retroactively in federal habeas corpus proceedings to invalidate a final state

criminal conviction. Teague v. Lane, 489 U.S. 288, 305-311, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989); see also Stringer v. Black, 503 U.S. ___, 112 S. Ct. 1130, 117 L. Ed. 2d 367 (1992); Butler v. McKellar, 494 U.S. 407, 110 S. Ct. 1212, 1217, 108 L. Ed. 2d 347 (1990). The retroactivity rule was motivated by a respect for the States' strong interest in the finality of criminal convictions, and the recognition that a State should not be penalized for relying on the "constitutional standards that prevailed at the time the original proceedings took place." Lockhart v. Fretwell, ___ U.S. ___, 113 S. Ct. 838, 844, 122 L. Ed. 2d 180 (1993).

This Court has also continuously reaffirmed that the threshold question in every habeas case is whether the court is obligated to apply the Teague rule to the defendant's claim. Caspari v. Bohlen, ___ U.S. ___, 114 S. Ct. 948, 953, 127 L. Ed. 2d 236 (1994); see also, Sawyer v. Smith, 497

U.S. 227, 110 S. Ct. 2822, 2826-2827, 111 L. Ed. 2d 193 (1990); Saffle v. Parks 494 U.S. 484, 110 S. Ct. 1257, 1259-1260, 108 L. Ed. 2d 415 (1990); Penry v. Lynaugh, 492 U.S. 302, 109 S. Ct. 2934, 2952, 106 L. Ed. 2d 256 (1989). Retroactivity is properly treated as a threshold question, for, once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated. Teague v. Lane, 489 U.S. at 300. Thus, the question of retroactivity must be determined *before* the merits of a defendant's claim.

The Ninth Circuit wrote two opinions in this case, and did not feel compelled to address the Teague question raised by California in either one. The Ninth Circuit made no attempt to resolve the retroactivity issue; since the Teague issue was raised and rejected in the last sentence of its amended opinion, California submits the Teague issue

was not addressed at all.

Pursuant to this Court's precedent, the Ninth Circuit was required to address the Teague issue *before* considering whether the trial court's conduct and comments in this case violated the Constitution. Caspari v. Bohlen, 114 S. Ct. at 953. The Ninth Circuit's failure to address Teague as a threshold issue in this case was particularly injurious, because the Ninth Circuit announced a new rule.

A case announces a new rule when it breaks new ground, imposes a new obligation on the States or the Federal Government, or if the result was not dictated by precedent existing at the time the defendant's conviction became final. Butler v. McKellar, 494 U.S. 407, 414 (1990). Every rule of law is "new" for Teague purposes, and thus unenforceable in federal habeas corpus proceedings, unless it was so clearly dictated by pre-existing precedent that "all reasonable

jurists would have deemed themselves compelled to accept" the claim at the time of the finality of the petitioner's conviction. Graham v. Collins, ___ U.S. ___, 113 S. Ct. 892, 897, 122 L. Ed. 2d 260 (1993).

In determining whether Teague applies, the federal court must ascertain 1) the date on which the defendant's conviction became final for Teague purposes; 2) the legal landscape as it then existed; and 3) whether either of the two narrow exceptions to the nonretroactivity principle apply. Caspari v. Bohlen, 114 S. Ct. at 953.

The California Supreme Court denied Jimenez' petition for review on March 21, 1990. Since Jimenez did not file a petition for a writ of certiorari, the conviction became final 90 days later. Caspari v. Bohlen, 114 S. Ct. at 954; Rules of the Supreme Court of the United States, Rule 13.

As to the legal landscape as it existed then and now, California's highest court has

consistently determined that a judicial inquiry into the jury's division is noncoercive and entirely appropriate. People v. Rodriquez, 726 P.2d 113, 142, n. 14 (1986); see also People v. Proctor, 842 P.2d 1100 (1992). That Court has also ruled that use of the Allen charge is coercive and reversible error. People v. Gainer, 566 P.2d 997 (1977). The trial judge in this case reasonably relied on that precedent during the course of the trial. Since the "new rule" principle of Teague serves to validate reasonable, good faith interpretations of existing precedents made by state courts even though they are later shown to be contrary to later decisions (Butler v. McKellar, 494 U.S. at 415; Sawyer v. Smith, 497 U.S. 227, 234 (1990)), the Ninth Circuit's decision that the trial judge gave a "de facto Allen charge" by inquiring into the jury's numerical division is a new rule.

Finally, neither of the two narrow exceptions to the nonretroactivity principle

apply in this case. The rule does not place any conduct, much less primary, private individual conduct beyond the power of the criminal law-making authority to proscribe. Nor does the rule embody a procedure without which the likelihood of an accurate conviction is seriously diminished. Teague v. Lane, 489 U.S. at 307-313.

The Ninth Circuit stated it did not question the practice of California judges to ask the jury its numerical division after an impasse. Thus, the Court determined it had not announced a new rule in this case, but instead simply applied the well-established "totality of the circumstances" test. App. C.

However, "the fact that a court says that its decision is within the `logical compass' of an earlier decision, or indeed that it is `controlled' by a prior decision, is not conclusive for purposes of deciding whether the current decision is a `new rule' under Teague." Butler v. McKellar, 494 U.S. 407,

415 (1990). Novelty turns on whether the rule would represent a "development in the law over which reasonable jurists could disagree." Sawyer v. Smith, 497 U.S. at 234.

If the Ninth Circuit had considered the Teague question in the manner mandated by this Court, it would have been clear that the rule announced in this case -- that a trial court's neutral numerical inquiry will become a "de facto Allen charge" if it is not accompanied by a second cautionary instruction -- was surely susceptible to debate among reasonable legal minds. Butler v. McKellar, 494 U.S. at 415.

Even assuming the Ninth Circuit did not announce a "new rule" in this case, it is still necessary to inquire whether that Court applied a settled rule in a novel way. Teague also applies if granting the relief sought would create a new rule by applying a prior decision in a novel setting, thereby extending the precedent. Stringer v. Black, 503 U.S.

___, 112 S. Ct. 1130, 1135, 117 L. Ed. 2d 367 (1992). The interests in finality, predictability, and comity underlying the new rule jurisprudence may be undermined to an equal degree by the invocation of a rule that was not dictated by precedent as by the application of an old rule in a manner that was not dictated by precedent. Ibid.

The question is not whether application of the "totality of the circumstances" test is a new rule. It is not. Nor is the question whether a trial court's statements to a jury can be so coercive as to rise to the level of a constitutional violation. It is clear they may. See Gilmore v. Taylor, 113 S. Ct. at 2121-2122, (O'Conner, J., concurring opinion). The question is whether the Ninth Circuit's conclusion -- that the neutral inquiry by the trial court in this case became a "de facto Allen charge" because it was not accompanied by a second cautionary instruction -- constitutes an extension of precedent, "a new

rule of law," that should not have been retroactively imposed to defeat the state conviction in this case.

The term "Allen charge" is the generic name for a class of supplemental jury instructions given when jurors are apparently deadlocked. The Allen charge stands at the brink of impermissible coercion, and even in its most acceptable form the charge approaches the ultimate permissible limit. United States v. Mason, 658 F.2d 1263, 1265-1266 (9th Cir. 1981.)

While the Allen charge specifically places pressure on the minority jurors to re-examine their views, the trial court's inquiry to the jury in this case was neutral and no pressure was placed on individual jurors. The court was careful not to ask which way any individual juror had voted, and did not ask whether the majority was moving toward guilt or acquittal as the votes changed. The trial court never told the jury to seek unanimity

and certainly never told the minority jurors to reconsider their views. As Circuit Judge Kozinski says, the trial judge never exhorted the jury to do anything. Instead, the trial court merely requested that the jury continue to deliberate because there had been "movement" during deliberations indicating the possibility of a verdict.

Another well established precedent is that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. Cupp v. Naughten, 414 U.S. 141, 147. Also, it may be assumed a jury understood and followed the instructions given them. Francis v. Franklin, 471 U.S. 307, 324, n. 9 (1985). Here, the jury was specifically instructed not to surrender their individual views in favor of compromise and unanimity. App. C. The jury is deemed to have followed that instruction.

In sum, the Ninth Circuit's conclusion -

that the trial judge gave a "de facto Allen charge" which required a second admonishment in order to counterbalance the trial court's inquiry - was an extension of well-settled precedent.

As noted by Circuit Judge Kozinski in dissent, "Teague is clearly implicated" in this case. App. A. Specifically, the rule promulgated by the Ninth Circuit was not compelled by precedent (or in the alternative constituted an extension of precedent), and did not fall within one of the two Teague exceptions. The "new rule" should not have been retroactively imposed to defeat the state conviction in this case.

Retroactive application of the Ninth Circuit's amended opinion in this case will significantly impair California's legitimate interest in maintaining convictions secured through procedures which complied with state and federal law. Therefore, California prays that this Court grant certiorari review.

CONCLUSION

The petitition for a writ of certiorari should be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GREGORIO JIMINEZ, Petitioner-Appellant, v. E.R. Myers, Warden, Attorney General of California, Respondents-Appellees.	)	No. 91-56476 D.C. No. CV-90-0419-GLT ORDER AND AMENDED OPINION

Appeal from the United States District Court for the Central District of California
Gary L. Taylor, District Judge, Presiding

Argued and Submitted
March 2, 1993 -- Pasadena, California

Filed December 8, 1993
Amended October 28, 1994

Before: James R. Browning, Procter Hug, Jr., and Alex Kozinski, Circuit Judges

Per Curiam; Dissent by Judge Kozinski

SUMMARY

Criminal Law and Procedure/Due Process/Juries

The court of appeals reversed a district court judgment. The court held that a defendant was denied a fair trial, where, after the jury declared itself to be at an impasse, the trial court inquired into the numerical division of the jury, implicitly approved of a "movement" toward unanimity, and instructed the jury to continue deliberating after learning that there was only a single hold-out juror.

During deliberations in petitioner Gregorio Jiminez's criminal trial, a jury sent the state trial judge a note stating that they felt strongly that they would be unable to reach a verdict. The court called in the jury, and asked the foreperson for its numerical split. The foreperson replied "nine to three." The court asked if there had been any movement one way or the other. After the foreperson stated that there had been movement, the court sent the jury back for further deliberations.

The jury later sent another note to the court, stating that they were at an impasse. The court again asked for the numerical split. Noting that there had been movement, the court stated: "Due to the fact we have had that type of movement, I would request, then, to finish the rest of today." After one hour and 48 minutes of deliberation, the jury returned a verdict of guilt.

After unsuccessfully raising the issue of jury coercion to the California Court of Appeals and seeking review by the California Supreme Court, Jiminez filed a petition for a writ of habeas corpus, claiming that the state trial judge coerced the jury into rendering a guilty verdict in violation of his right to due process. The district court denied the petition, finding that the hold-out juror would not have felt coerced because he or she would have known that the judge would declare a mistrial at the end of the day. Jiminez appealed the denial of his petition.

[1] The Ninth Circuit previously held that a trial court's neutral inquiry into the division of the jury without other circumstances suggestive of coercion does not deprive a defendant of due process. However, the record showed that much more occurred in this case. [2] After the first impasse, by eliciting the progression in the voting, determining it was moving in one direction, expressing approval of that progression, and telling the jury to continue its deliberations, the trial court effectively instructed the jurors to make every effort to reach a unanimous verdict. In view of the disclosure after the second impasse that only one juror remained in the minority and the trial court's implicit approval of the "movement" toward unanimity, the court's instruction to continue deliberating until the end of the day sent a clear message that the jurors in the majority were to hold their position and persuade the single hold-out

juror to join in a unanimous verdict, and the hold-out juror was to cooperate in the movement toward unanimity.

[3] The trial court's failure to counterbalance the implication of its questions and comments by instructing the hold-out juror not to surrender his or her sincere convictions strongly supported the conclusion that the jury was impermissibly coerced to render a unanimous verdict.

[4] In light of all the circumstances, Jiminez was denied a fair trial. Under established due process standards, the comments and conduct of the trial court in this case crossed the line between neutral inquiry and coercive instruction.

Circuit Judge Kozinski dissented, stating that what happened in this case was *nothing* like giving an *Allen* charge, where the trial judge explicitly exhorts jurors to try to achieve unanimity.

COUNSEL

Howard C. Cohen, Appellate Defenders, Inc., San Diego, California, for the appellant.

Peggy S. Ruffra, Deputy Attorney General, State of California, Los Angeles, California, for the appellee.

ORDER

The opinion filed December 8, 1993, slip op. at 13767, is amended by substituting the attached part II for that originally filed.

OPINION

PER CURIAM:

Gregorio Jiminez appeals the district court's denial of his petition for a writ of habeas corpus based on the claim that the state trial judge coerced the jury into rendering a guilty verdict in violation of Jiminez's Fourteenth Amendment right to due process.

I.

Jiminez fired two shots through the front door of his cousin's house after she ran inside following an argument. He was convicted of attempted murder. At trial he claimed he intended only to frighten his cousin and had not fired until he believed she had moved away from the door. In an effort to

gain an acquittal, Jiminez and his counsel made a "tactical decision . . . not to seek any lesser included offenses or submit instructions thereon for the jury's consideration." In addition to describing the elements of attempted murder and giving other standard charges, the court instructed the jury that each juror should decide the case after discussion, but without succumbing to the pressure of the majority.[1/]

After four and three quarter hours of

---

1. The court stated,

> Both the people and the defendant are entitled to the individual opinion of each juror.
>
> It is the duty of each of you to consider the evidence for the purpose of arriving at a verdict if you can do so. Each of you must decide the case for yourself, but should do so only after a discussion of the evidence and instructions with the other jurors.
>
> You should not hesitate to change an opinion if you are convinced it is erroneous. However, you should not be influenced to decide any question in a particular way because a majority of the jurors, or any of them, favor such a decision.

deliberations, the jury sent the judge a note stating, "We are unable to reach a verdict and feel strongly that we would not be able to reach a verdict." Defense counsel took the position that "[i]n a case like this with this type of emotions and feelings, if they're deadlocked now, they're rarely going to change." The court called in the jury and engaged in the following exchange with the foreperson:

> THE COURT: What I would like to know, how many votes have been taken?
>
> FOREPERSON: Five or six.
>
> THE COURT: Without telling me which direction, just numerically, how did it start, and what was it on the last?
>
> FOREPERSON: [I will] Try to tell you numerically without [indicating] either way. To the best of my recollection, it started out about

maybe seven to five, eight to four. Went to nine to three. All right. To back up, this morning, nine, two, and one. . . . This afternoon though, nine to three.

* * *

THE COURT: All right. So you did have -- how about in between, nine-two and one and then nine-three, has there been any movement one way or the other?

FOREPERSON: Nine-one-two, I would say at this point. Any yes, there has been some movement in one direction.

THE COURT: Okay. Well, that's what's important to me because of the nature of the type of case. I want to find out that there has been movement.

After a three-day weekend, the jury returned to its deliberations. Three hours

later, the jury sent another note to the court stating, "We are at an impasse and request further direction." The prosecutor responded, "If the impasse means that they're once again hopelessly hung, perhaps now would be the time to accept that and set it for retrial." Defense counsel agreed, "Any further pressure upon [the jury] would be prejudicial to the defendant." The court declared it would bring the jurors back to the courtroom to "see if there's been any substantial movement at all. If there has not been, then I'll have to declare a mistrial."

The court's questions to the jury and the foreperson's responses were as follows:

> THE COURT: Okay. Now last Friday I inquired of you as to whether or not there had been any movement by the jury. So I'll ask you that same question again with the understanding, all I want is numbers, not which direction you're

at. How many votes have you taken since last Friday?

FOREPERSON: Two or three. Two.

COURT: Two more?

FOREPERSON: Un-huh.

COURT: What's the latest?

FOREPERSON: Eleven-one.

COURT: So there has been, then, sustantial movement since the last time.

FOREPERSON: Yes.

THE COURT: All right. Due to the fact we have had that type of movement, I would request, then, to finish the rest of today and see where we are at that point in time. All right? Okay.

Defense counsel objected and asked the court to inquire whether further deliberation would be fruitful. Counsel explained, "if there's one person in there that's for not quilty, it's putting them on a tremendous

amount of pressure, and I don't think they should be subjected to that pressure." The court concluded the hold-out juror would not be subjected to "undue pressure" in light of the substantial change in the vote within the jury in the course of their deliberartions and because the jury had been asked to deliberate "the rest of today" -- about two more hours. The jury returned a guilty verdict after an hour and forty-eight minutes of additional deliberation.

Jiminez raised the issue of jury coercion without success on appeal to the California Court of Appeals and in a petition for review to the Califonria Supreme Court. Jiminez then filed this petition for a writ of habeas corpus.

The magistrate judge recommended the writ be granted on the ground the state trial judge had coerced the hold-out juror into joining in the guilty verdict. The magistrate judge noted that the state trial judge twice polled

the jury about the jury's numerical division on the merits after the jury had announced an impasse; that the proseuction and defense agreed to accept a deadlock after the jury's second note, but the court refused; and that the judge's comments to the jury strongly implied the jury's movement from an initial division of seven to five to a division of eleven to one should continue toward unanimity. The district court disagreed, stating, inter alia, that the holding-out juror would not have felt coerced because he or she would have known the judge would declare a mistrial at the end of the day.

II.

Whether the comments and conduct of the state trial judge infringed defendant's due process right to an impartial jury and fair trial turns upon whether "the trial judge's inquiry would be likely to coerce certain jurors into relinquishing their views in favor of reaching a unanimous decision." *Locks v.*

Summer, 703 F.2d 403, 406 (9th Cir. 1983.) Whether the state trial judge coerced the "holdout" juror to join with the others to make the verdict unanimous is a mixed question of law and fact "requiring the application of legal principles to the historical facts." *Hamilton v. Vasquez*, 882 F.2d 1469, 1471 (9th Cir. 1989) (citation omitted). Accordingly, we determine *de novo* the constitutional weight to be given the facts. See *Id.* at 1471 (citing *Reiger v. Christensen*, 789 F.2d 1425, 1428-29 (9th Cir. 1986)); *Torrey v. Estelle*, 842 F.2d 234, 235 (9th Cir. 1988). We consider whether the court's actions and statements were coercive in the totality of the circumstances. *See Locks*, 703 F.2d at 406-07 ("the inquiry by the judge must be viewed in light of the context in which it was made, not in isolation") (citations omitted); *United States v. Seawell*, 550 F.2d 1159, 1163 (9th Cir. 1977) ("the general test of whether a supplemental jury instruction is in error is

to consider all the circumstances to determine if the instruction was coercive") (citation omitted); *Marsh v. Cupp*, 536 F.2d 1287, 1290 (9th Cir. 1976) (test for jury coercion is "'whether in its context and under all the circumstances of this case the statement was coercive'") (quoting *Jenkins v. U.S.*, 380 U.S. 445 (1965).[2/]

[1] Applying the totality of the cirustances test, we held in *Locks v. Summer* that a trial

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2. Other circuits apply the same test. E.g., *Williams v. Parke*, 741 F.2d 847, 850 (6th Cir. 1984) (totality of circumstances); *Cornell v. Iowa*, 628 F.2d 1044, 1048 (8th Cir. 1980) (same); *Ellis v. Reed*, 596 F.2d 1195, 1197-1200 (4th Cir. 1979) (same). The totality of the circumstances standard had its origin in *Jenkins v. United States*, 380 U.S. 445 (1965). In reversing a conviction obtained after the judge told the jury it was required to reach a verdict, the Supreme Court stated, "[u]pon review of the record, we conclude that in its context and under all the circumstances the judge's statement had the coercive effect attributed to it." *Id.* at 446. *See Lowenfield v. Phelps*, 484 U.S. 231, 237 (1988) ("Our review of petitioner's contention that the jury was improperly coerced requires that we consider the supplemental charge given by the trial court 'in its context and under all the circumstances.'") (quoting *Jenkins.*)

court's neutral inquiry into the division of the jury without other circumstances suggestive of coercion does not deprive a defendant of due process.[3] 703 F.2d at 407.[4] The state contends the trial court simply made the same neutral, non-coercive inquiry held constitutional in *Locks*, and commonly employed by California trial judges. The record shows much more occurred. After

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3. If this were a federal case and therefore subject to our supervisory powers as well as to the requirements of due process, the trial judge's first inquiry into the numerical division of the jury would have required reversal. *Brasfield v. United States*, 272 U.S. 448 (1926). Since *Bradsfield's* per se rule rests on the supervisory power, it does not apply in federal habeas review. *Lowenfield v. Phelps*, 484 U.S. at 239-40 & n.3 (19988); *Locks*, 703 F.2d at 406.

4. Before dismissing the jury for the weekend, the state trial court in *Locks* asked the jury:

> "I say, just on a numerical basis only without telling me how many for one side or how many for another, can you give me the standing of the jury at the last ballot."

Locks, 703 F.2d at 405 n.1.

the jury first announced it had reached an impasse, the trial judge took a number of steps the judge in *Locks* did not: (1) the judge inquired how many ballots had been taken, and was told "five or six"; (2) the judge asked how the vote started and ended; the foreperson responded that the jury started out seven to five, went to eight to four, then nine to three, and was currently nine-two and one; (3) the judge then asked: "has there been any movement one way or another?" The foreman stated "yes, there has been some movement in one direction"; (4) the court then said: "Well, that's what's important to me . . . . I want to find out that there has been movement." (5) The judge returned the jury to its deliberations. After further deliberations, the jury informed the court it was at an impasse a second time, and (6) on inquiry stated it was divided eleven to one. Again, the trial court took steps beyond those taken in *Locks*: (7) the court said: "So there

has been, then, substantial movement since the last time," and the foreperson responded "yes"; (8) the court then stated: "Due to the fact we have that type of movement, I would request, then, to finish the rest of today and see where we are at that point in time."

[2] Viewed together and against the backdrop of the particular circumstances of the case, the trial court's comments and conduct amounted to giving the jury a de facto *Allen* charge, which instructs the jurors to work towards unanimity and the minority to reexamine its views. See *Allen v. United States*, 164 U.S. 492 (1896). After the first impasse, by eliciting the progression in the voting, determining it was moving in one direction, expressing his approval of that progression, and telling the jury to continue its deliberations, the trial court effectively instructed the jurors to make every effort to reach an unanimous verdict. In view of the disclosure after the second impasse that only

one juror remained in the minority and the trial court's implicit approval of the "movement" toward unanimity, the court's instruction to continue deliberating until the end of the day sent a clear message that the jurors in the majority were to hold their position and persuade the single hold-out juror to join in an unanimous verdict, and the hold-out juror was to cooperate in the movement toward unanimity.

[3] Both counsel reflected an awareness of the risk of coercion. After the first impasse, defense counsel noted his concern; after the second, defense counsel requested a mistrial and the government acquiesced. A single vote stood between defendant and conviction. In such a case "the most extreme care and caution were necessary in order that the legal rights of the defendant should be preserved." *Burton v. U.S.*, 196 U.S. 283, 307 (1905). The trial court's failure to counterbalance the implication of its

questions and comments by instructing the hold-out juror not to surrender his or her sincere convictions strongly supports the conclusion that the jury was impermissibly coerced to render a unanimous verdict. See *Jones v. Novell*, 472 F.2d 1185, 1186 (6th Cir. 1973).[5/]

[4] We conclude from all the circumstances that the defendant was denied a

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5. When a trial court gives an *Allen* charge, it "is essential in almost all cases to remind jurors of their duty and obligation not to surrender conscientiously held beliefs simply to secure a verdict for either party." *United States v. Mason*, 658 F.2d 1263, 1268 (9th Cir. 1981). A trial court's failure to give such a cautionary instruction weighs heavily in favor of the conclusion that the defendant's right to a fair trial and impartial jury has been violated. See *United Sates v. Bonam*, 772 F.2d 1449, 1450 (9th Cir. 1985); *Mason*, 658 F.2d at 1268.

At oral argument the state seemed to suggest California law precluded such an admonition. On the contrary, the California Supreme Court has approved supplemental instructions reminding jurors not to surrender their convictions simply because a majority of jurors has taken a different view of the case. See *People v. Sheldon*, 771 P.2d 1330, 1343-44 (Cal. 1989); *People v. Keenan*, 758 P.2d 1081, 1113-18 (Cal. 1988).

fair trial. In reaching this conclusion, we do not question the practice of California judges to ask the jury its numerical division after an impasse. We conclude, however, that under established due process standards, the comments and conduct of the trial court in this case crossed the line between neutral inquiry and coercive instruction.

Because we simply apply the well-established "totality of the circumstances" test, *Teague v. Lane*, 489 U.S. 288 (1989), does not apply.

REVERSED.

Kozinski, Circuit Judge, dissenting:

The majority has made a bad situation worse. In its earlier opinion, it merely held that "our *Allen* charge cases are relevant." 12 F.3d 1474, 1477 (9th Cir. 1993). Today, it invents a whole new doctrine -- the "de facto *Allen* charge." Maj. op. at 13122. According to the majority, "the court's instruction to continue deliberating until the end of the day

sent a clear message that the jurors in the majority were to hold their position and persuade the single hold-out juror to join in a unanimous verdict, and the hold-out juror was to cooperate in the movement towards unanimity." *Id.*

With all due respect to my colleagues, this is sheer phantasy. What happened here is *nothing* like giving an *Allen* charge, where the trial judge explicitly exhorts jurors to try to achieve unanimity. The idea that we can piece together a de facto *Allen* charge from a trial judge's questions and comments, none of which exhorts the jury to do anything at all, is far more novel and far more dangerous than what the majority said the last time around. *Teague v. Lane*, 489 U.S. 288 (1989), is clearly implicated.

For these reasons, and those stated in my earlier dissent, *see* 12 F.3d at 1479-85, I continue to believe that the district court's judgment must be affirmed.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS CALIFORNIA

FOR THE NINTH CIRCUIT

GREGORIO JIMINEZ,	) No. 91-56476
Petitioner-Appellant,	) D.C. No. CV-90-0419-GLT
v.	) ORDER
E.R. MYERS, Warden, ATTORNEY GENERAL OF CALIFORNIA,	)
Respondents-Appellees.	)

Before: BROWNING, HUG, and KOZINSKI, Circuit Judges

A majority of the panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is

rejected.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GREGORY JIMINEZ, Petitioner-Appellant, v. E.R. MYERS, Warden; Attorney General of California, Respondents-Appellees.	No. 91-56476 D.C. No. CV-90-0419-GLT OPINION

Appeal from the United States District Court for the Central District of California Gary L. Taylor, District Judge, Presiding

Argued and Submitted March 2, 1993--Pasadena, California

Filed December 8, 1993

Before: James R. Browning, Procter Hug, Jr., and Alex Kozinski, Circuit Judges.

Per Curiam; Dissent by Judge Kozinski

SUMMARY

Criminal Law and Procedure/Juries/Jury Instructions

The court of appeals reversed a district court judgment. The court held that a trial judge impermissibly coerced a jury, which had declared itself to be at an impasse, to render a guilty verdict when, without admonishing the jurors not to surrender their individual views in order to achieve a verdict, the judge repeatedly inquired into the numerical division of the jury and told the jury to seek unanimity when there was only a single hold-out.

During deliberations in petitioner Gregorio Jimenez's criminal trial, a jury sent the state trial judge a note stating that they felt strongly that they would be unable to reach a verdict. The court called in the jury, and asked the foreperson for its numerical split. The foreperson replied "nine to three." The court asked if there had been any movement one way or the other. After the

foreperson stated that there had been movement, the court sent the jury back for further deliberations.

The jury later sent another note to the court, stating that they were at an impasse. The court again asked for the numerical split. Noting that there had been movement, the court stated: "Due to the fact we have had that type of movement, I would request, then, to finish the rest of today." After one hour and 48 minutes of deliberation, the jury returned a verdict of guilty.

After unsuccessfully raising the issue of jury coercion to the California Court of Appeal and seeking review by the California Supreme Court, Jimenez filed a petition for a writ of habeas corpus, claiming that the state trial judge coerced the jury into rendering a guilty verdict in violation of his right to due process. The district court denied the petition, finding that the hold-out juror would not have felt coerced because he or she

would have known that the judge would declare a mistrial at the end of the day. Jimenez appealed the denial of his petition.

[1] The trial judge twice asked the jury for their numerical split on the merits, and both times sent the jury back for further deliberations on the stated ground that there had been movement toward unanimity. The court indicated its approval of the movement, and expressed the hope that it would continue. The form of the exchange placed pressure on the hold-out jurors to join the others in the movement toward unanimity.

[2] In cases where a trial judge's actions and comments place pressure on hold-out jurors, the judge must remind the jurors of their duty not to surrender conscientiously held beliefs in order to secure a verdict. [3] In this case, the trial judge failed to admonish the jury not to surrender their sincere convictions. The fact that the court asked the jury to continue to deliberate only

for the balance of the day was not enough to remove the pressure on the hold-out juror.

[4] Thus, the state trial judge violated Jimenez's due process rights by impermissibly coercing the jury to render a guilty verdict.

Circuit Judge Kozinski dissented, noting that California has determined that a judicial inquiry into the jury's division is noncoercive and entirely appropriate. Moreover, even if adopted, the majority's approach should not be applied retroactively to any state prisoner whose conviction has become final; in a plurality opinion, the Supreme Court held that where federal courts adopt a new rule as a concomitant of due process, the rule must, except in rare cases, be applied only prospectively.

COUNSEL

Howard C. Cohen, Appellate Defenders, Inc.,

San Diego, California, for the petitioner-appellant.

Peggy S. Ruffra, Deputy Attorney General, Los Angeles, California, for the respondents-appellees.

OPINION

PER CURIAM:

Gregorio Jimenez appeals the district court's denial of his petition for a writ of habeas corpus based on the claim that the state trial judge coerced the jury into rendering a guilty verdict in violation of Jimenez's Fourteenth Amendment right to due process.

I.

Jimenez fired two shots through the front door of his cousin's house after she ran inside following an argument. He was convicted of attempted murder. At trial he claimed he intended only to frighten his

cousin and had not fired until he believed she had moved away from the door. In an effort to gain an acquittal, Jimenez and his counsel made a "tactical decision . . . not to seek any lesser included offenses or submit instructions thereon for the jury's consideration." In addition to describing the elements of attempted murder and giving other standard charges, the court instructed the jury that each juror should decide the case after discussion, but without succumbing to the pressure of the majority.[1/]

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1. The court stated,

> Both the people and the defendant are entitled to the individual opinion of each juror.
>
> It is the duty of each of you to consider the evidence for the purpose of arriving at a verdict if you can do so. Each of you must decide the case for yourself, but should do so only after a discussion of the evidence and instructions with the other jurors.
>
> You should not hesitate to change an opinion if you are convinced it is erroneous.

After four and three quarter hours of deliberations, the jury sent the judge a note stating, "We are unable to reach a verdict and feel strongly that we would not be able to reach a verdict." Defense counsel took the position that "[i]n a case like this with this type of emotions and feelings, if they're deadlocked now, they're rarely going to change." The court called in the jury and engaged in the following exchange with the foreperson:

> THE COURT: What I would like to know, how many votes have been taken?
>
> FOREPERSON: Five or six.
>
> THE COURT: Without telling me which direction, just numerically, how did it start, and what was it on the

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However, you should not be influenced to decide any question in a particular way because a majority of the jurors, or any of them, favor such a decision.

last?

FOREPERSON: [I will] Try to tell you numerically without [indicating] either way. To the best of my recollection, it started out about maybe seven to five, eight to four. Went to nine to three. All right. To back up, this morning, nine, two, and one. . . . This afternoon though, nine to three.

* * *

THE COURT: All right. So you did have -- how about in between, nine-two and one and then nine-three, has there been any movement one way or the other?

FOREPERSON: Nine-one-two, I would say at this point. And yes, there has been some movement in one direction.

THE COURT: Okay. Well, that's what's important to me because of

the nature of the type of case. I want to find out that there has been movement.

After a three-day weekend, the jury returned to its deliberations. Three hours later, the jury sent another note to the court stating, "We are at an impasse and request further direction." The prosecutor responded, "If the impasse means that they're once again hopelessly hung, perhaps now would be the time to accept that and set it for retrial." Defense counsel agreed, "Any further pressure upon [the jury] would be prejudicial to the defendant." The court declared it would bring the jurors back to the courtroom to "see if there's been any substantial movement at all. If there has not been, then I'll have to declare a mistrial."

The court's questions to the jury and the foreperson's responses were as follows:

THE COURT: Okay. Now last Friday I

inquired of you as to whether or not there had been any movement by the jury. So I'll ask you that same question again with the understanding, all I want is numbers, not which direction you're at. How many votes have you taken since last Friday?

FOREPERSON: Two or three. Two.

COURT: Two more?

FOREPERSON: Un-huh.

COURT: What's the latest?

FOREPERSON: Eleven-one.

COURT: So there has been, then, substantial movement since the last time.

FOREPERSON: Yes.

THE COURT: All right. Due to the fact we have had that type of movement, I would request, then, to finish the rest of today and see where we are at that point in time.

All right? Okay.

Defense counsel objected and asked the court to inquire whether further deliberation would be fruitful. Counsel explained, "if there's one person in there that's for not guilty, it's putting them on a tremendous amount of pressure, and I don't think they should be subjected to that pressure." The court concluded the hold-out juror would not be subjected to "undue pressure" in light of the substantial change in the vote within the jury in the course of their deliberations and because the jury had been asked to deliberate "the rest of today" -- about two more hours. The jury returned a guilty verdict after an hour and forty-eight minutes of additional deliberation.

Jimenez raised the issue of jury coercion without success on appeal to the California Court of Appeal and in a petition for review to the California Supreme Court. Jimenez then filed this petition for a writ of habeas

corpus.

The magistrate judge recommended the writ be granted on the ground the state trial judge had coerced the hold-out juror into joining in the guilty verdict. The magistrate judge noted that the state trial judge twice polled the jury about the jury's numerical division on the merits after the jury had announced an impasse; that the prosecution and defense agreed to accept a deadlock after the jury's second note, but the court refused; and that the judge's comments to the jury strongly implied the jury's movement from an initial division of seven to five to a division of eleven to one should continue toward unanimity. The district court disagreed, stating, inter alia, that the hold-out juror would not have felt coerced because he or she would have known the judge would declare a mistrial at the end of the day.

II

Whether the trial judge coerced the jury

into rendering a guilty verdict is a mixed question of law and fact "requiring the application of legal principles to the historical facts." *Hamilton v. Vasquez*, 882 F.2d 1469, 1471 (9th Cir. 1989). Accordingly, our review of the "legal weight" given to the facts is de novo. *See Sumner v. Mata*, 455 U.S. 591, 597 & n.10 (1982); *Hamilton*, 882 F.2d at 1471; *Torrey v. Estelle*, 842 F.2d 234, 235 (9th Cir. 1988). We consider whether the court's actions were coercive under a totality of the circumstances test. *See United States v. Seawell*, 550 F.2d 1159, 1163 (9th Cir. 1977) ("the general test of whether a supplemental jury instruction is in error is to consider all the circumstances to determine if the instruction was coercive"); *Marsh v. Cupp*, 536 F.2d 1287, 1290 (9th Cir. 1976) (test for jury coercion is "whether in its context and under all the circumstances of

this case the statement was coercive'").[2/]

Although this case does not specifically involve review of an *Allen* charge, *see Allen v. United States*, 164 U.S. 492 (1896), clearly our *Allen* charge cases are relevant. They consider four factors in determining whether there has been undue coercion:

1) the form of the supplemental instruction;

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2. Other circuits apply the same test. *E.g.*, *Williams v. Parke*, 741 F.2d 847, 850 (6th Cir. 1984) (totality of circumstances); *Cornell v. Iowa*, 628 F.2d 1044, 1048 (8th Cir. 1980) (same); *Ellis v. Reed*, 596 F.2d 1195, 1197-1200 (4th Cir. 1979) (same). The totality of the circumstances standard had its origin in *Jenkins v. United States*, 380 U.S. 445 (1965). In reversing a conviction obtained after the judge told the jury it was required to reach a verdict, the Supreme Court stated, "Upon review of the record, we conclude that in its context and under all the circumstances the judge's statement had the coercive effect attributed to it." *Id.* at 446. *See Lowenfield v. Phelps*, 484 U.S. 231, 237 (1988) ("Our review of petitioner's contention that the jury was improperly coerced requires that we consider the supplemental charge given by the trial court `in its context and under all the circumstances.'") (quoting *Jenkins*); *Seawell*, 550 F.2d at 1163 (citing *Jenkins*); *Marsh*, 536 F.2d at 1290 & n. 6 (same).

2) the period of deliberations following the instruction;

3) the total time of deliberations;

4) any indicia of coerciveness or pressure.

United States v. Wauneka, 842 F.2d 1083, 1088 (9th Cir. 1988). We consider the same factors in this case to determine whether, under the totality of the circumstances, the trial judge coerced the jury. We recognize, however, that coercion must be more severe to constitute a violation of due process than to invoke our supervisory powers. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 642-43 (1974).

[1] 1) *The Form of the Exchange Between Judge and Jury* -- the jury twice informed the trial judge it had reached an impasse. The trial judge twice asked for their numerical split on the merits, and both times sent the jury back for further deliberations on the stated ground there had been movement toward

unanimity. The court indicated its approval of the movement and expressed the hope it would continue. The form of the exchange placed pressure first on the three hold-out jurors, and finally on the single hold-out juror, to join the others in the movement toward unanimity.

[2] Because an *Allen* charge carries the potential for jury coercion, we require a trial judge using the charge to instruct jurors not to surrender their sincere convictions when they reassess their positions. *United States v. Bonam*, 772 F.2d 1449, 1451 (9th Cir. 1985); *United States v. Mason*, 658 F.2d 1263, 1268 (9th Cir. 1981) ("the integrity of individual conscience in the jury deliberation process must not be compromised"). Although the trial judge in this case placed pressure on the hold-out jurors to reconsider their views, he did not remind them no juror "should be influenced to decide any question in a particular way

because a majority of the jurors . . . favor such a decision." [3] "It is essential [in cases where the trial judge's actions and comments place pressure on hold out jurors] to remind jurors of their duty and obligation not to surrender conscientiously held beliefs simply to secure a verdict for either party." *Mason*, 658 F.2d at 1268.

2) *Period of Deliberation After the*

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3. At oral argument, the State seemed to suggest the trial court could not repeat the cautionary admonition because the California Supreme Court has prohibited use of the coercive portion of the *Allen* charge. The California court has prohibited use of any supplemental charge that (1) directs minority or hold-out jurors to reconsider their views in light of the majority, (2) informs the jury that the case will be retried and decided eventually, or (3) informs the jury of the expense and inconvenience of retrial, *People v. Barraza*, 591 P.2d 947 (Cal.1979); *People v. Gainer*, 566 P.2d 997, 1003-06 & n.16 (Cal. 1977), but also has permitted California trial courts to provide supplemental instructions reminding jurors not to surrender their convictions simply because a majority of jurors has taken a different view of the case, *People v. Sheldon*, 771 P.2d 1330, 1343-44 (Cal.1989); *People v. Keenan*, 758 P.2d 1081, 1113-18 (Cal. 1988).

Exchange -- The jury reached its verdict one hour and forty-eight minutes after returning to deliberations following the second note. [4/] This period does not raise an inference of coercion. *Compare Bonam*, 772 F.2d at 1451 (no inference of coercion for verdict delivered an hour and a half after *Allen* charge where issue was simple and jury told it could take as much time as it needed), *with United States v. Contreras*, 463 F.2d 773, 774 (9th Cir. 1972) (reversing a conviction rendered thirty-five minutes after an *Allen* charge because the instruction was premature and coercive).

3) *Total Time of Deliberations* -- The jury deliberated a total of nine and a half hours. This was not "so disproportionate to the task before the jury as to raise an inference" of coercion. *United States v. Beattie*, 613 F.2d 762, 766 (9th Cir. 1980).

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4. Jimenez filed a motion that we take judicial notice of the trial minutes. They are part of the state court record and available for review without a motion.

[3] 4) *Indicia of Coerciveness or Pressure* -- The trial judge knew the jury was divided nine to three when he told them to continue their deliberations after their initial impasse; he knew they were divided eleven to one after the second impasse. The trial judge, as we have already said, failed to admonish them not to surrender their sincere convictions. The fact that the court asked the jury to continue to deliberate only for the balance of the day was not enough to remove the pressure on the hold-out juror. The court made clear it approved of the jury's movement toward unanimity and indicated "that type of movement" should continue, but did not suggest to the jury in any way that the court would declare a mistrial if no verdict was returned by the end of the day. After the second impasse, both the prosecutor and the defense believed a new trial was required.

This case is analogous to *Jones v. Norvell*, 472 F.2d 1185 (6th Cir. 1973). The

court vacated a state conviction after the trial judge learned the jury was deadlocked eleven to one, informed the jury it was their duty to reach a verdict, and told the jury to try to make progress in their deliberations. The jury returned a guilty verdict almost immediately. The Sixth Circuit said,

> the facts recited above involved the invasion of jury secrecy, the identification of a deadlocked jury's majority-minority count, a coercive jury charge, and the speedy return of a verdict subsequent to the charge. These facts constitute a totality of circumstances which violate the constitutional rights of appellants to a fair and impartial jury trial under the Sixth and Fourteenth Amendments.

Id. at 1186 (citations omitted). Although in the present case the jury was not told it had a duty to reach a verdict, the judge's

comments, twice repeated, clearly conveyed the message that the hold-out juror should promptly join the majority.

[4] If this were a federal case subject to our supervisory powers, the trial judge's first inquiry into the numerical division of the jury would have required reversal. *Brasfield v. United States*, 272 U.S. 448 (1926). Since *Brasfield's* per se rule rests on the supervisory power, it does not apply in federal habeas review. *Lowenfield v. Phelps*, 484 U.S. 231, 239-40 & n.3 (1988); *Locks* v. *Sumner*, 703 F.2d 403, 406 (9th Cir. 1983). Upon review of the totality of the circumstances of this case, however, including the facts that the court repeated the inquiry into the numerical division of the jury, told the jury it should seek unanimity when there was only a single hold-out, and failed to admonish individual jurors not to surrender their individual views simply to achieve a verdict, we conclude the state trial judge

violated Jimenez's due process rights by impermissibly coercing the jury to render a guilty verdict.[5/]

Reversed.

KOZINSKI, Circuit Judge, dissenting.

As federal judges, we're subject to a peculiar myopia: We tend to see the federal way of doing things as the best way, often as the be-all and end-all of due process. This preference for the familiar is understandable enough, but it carries with it special dangers when we review state convictions for constitutional error. There are many ways of giving a defendant a fair trial. We sap our federal system of vitality and creativity when we strike down state procedures because they differ from our own.

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5. We announce no "new rule as a concomitant of due process," as the dissent suggests, but simply apply the well-established "totality of the circumstances" test. *Teague v. Lane*, 489 U.S. 288 (1989) does not apply.

This is a case in point. Not everyone agrees on how to deal with a jury that indicates it's deadlocked. The jury shouldn't keep deliberating if unanimity is beyond reach, but it ought not to be discharged if there's a reasonable possibility of reaching agreement. To resolve this tension, most federal courts, as well as some state courts, give an *Allen* charge -- a fairly coercive instruction that tells jurors to go back and try again. The *Allen* charge has been subject to much criticism, however, and many courts have either modified or rejected it, the California Supreme Court among them.[1/] *People* v. *Gainer*, 19 Cal.3d 835 (1977), held that the *Allen* charge is inherently coercive and thus reversible error. In its place, the

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1. Even the federal courts are far from unanimous on how to deal with jury deadlock. While we allow the *Allen* charge in its original form, *see United States v. Seawell*, 583 F.2d 416 (9th Cir. 1978), the Third Circuit has forbidden it altogether, see *United States v. Graham*, 758 F.2d 879 (3d Cir. 1985).

California Supreme Court approved a neutral inquiry into the jury's numerical division as "an important tool in ascertaining the probability of agreement." *People* v. *Rodriguez*, 42 Cal.3d 730, 776 n.14 (1986). It has repeatedly refused to reconsider this practice. *See, e.g., People* v. *Price*, 1 Cal.4th 324, 467 (1991); *People* v. *Proctor*, 4 Cal.4th 499, 539 n. 7 (1992).

Confronted with a possible jury deadlock, the state trial judge here did precisely what his state supreme court told him to: He asked the foreperson about the jury's division. Upon learning there'd been movement in one direction, he exercised the discretion entrusted to him and sent the jury back for further deliberations. Later, when the jury again declared itself deadlocked, the judge again followed his supreme court's instructions and asked the foreperson for a division. Learning that the jury had moved even closer to agreement, the trial judge

again exercised his judgment and sent them back to deliberate. He turned out to be right: The jury returned a verdict later that day.

By overturning the conviction so obtained, my colleagues are casting serious doubt on a procedure the California Supreme Court and a number of other state supreme courts have approved for dealing with apparent jury deadlock. My colleagues hold that the practice of asking for a jury's division is so inherently coercive it renders a trial fundamentally unfair when combined with even the trivial comments the trial judge made here. This ruling bodes ill for countless convictions in California and other states that follow the California practice. *See* pp. 13782-13784 *infra*.

My colleagues give no persuasive reason for such heavy-handed interference with the power of state supreme courts to resolve difficult issues of trial practice. Today's

ruling moves us one step farther away from a truly federal system where the state courts serve as laboratories for shaping the flexible and evolving standards of due process. It moves us one step closer to a world where our way of doing things becomes the only way, where state courts dare not deviate from our procedures lest they risk wholesale invalidation of their convictions.

A. First things first. The majority overturns the conviction here because it finds the trial judge's actions unduly coercive. We should pause to ask whether the coercion of a few holdout jurors in a state criminal trial can ever violate due process. Jury coercion violates due process in a federal criminal trial because the defendant there is constitutionally entitled to a unanimous jury. *Johnson* v. *Louisiana*, 406 U.S. 356, 371 (1972) (Powell, J., concurring). Coercion of holdout jurors impairs the federal defendant's Sixth Amendment right to a fair

trial because it casts doubt on whether the jury was unanimous. But the defendant in a state criminal trial has no constitutional right to a unanimous jury; an 11-1, 10-2 or even 9-3 guilty verdict is consistent with due process. *Id.* at 363 (majority opinion). If a state can dispense with the concurrence of one, two, three -- perhaps even more -- holdout jurors altogether, why can't it try to secure the agreement of those same jurors through moral suasion?[2/] The latter procedure seems an *a fortiori* case of the former.

Nor is jury coercion inherently prejudicial to the defense. Our perception of this may be distorted because every time we see jury coercion, the jury has convicted;

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2. The matter might be different if the jury has made it clear it's leaning towards a conviction; jurors might then interpret a nudge towards unanimity as a hint that the judge believes the defendant is guilty. If the judge "urge[s] his own view of the guilt or innocence of the accused," he may interfere with the defendant's right to a trial by the jury. *Billeci* v. *United States*, 184 F.2d 394, 403 (D.C. Cir. 1950).

it's easy to conclude that coercion always harms defendants. But pressuring holdout jurors is just as likely to lead to an acquittal as to a conviction, depending on the direction the jury is leaning. When judicial pressure is applied without regard to whether the jury favors a conviction or an acquittal, it's hard to say this denies the defendant a fair trial.

Finally, it might be argued that if a defendant is entitled to a unanimous jury as a matter of state law, it violates due process to let the judge coerce the holdout jurors. But it all turns on how state law defines unanimity. Some states view unanimity in the same pristine fashion as the federal courts; others may temper the concept, allowing some pushing and tugging to get there. It surely doesn't violate due process for state law to define unanimity more flexibly than federal law.

The Supreme Court has, nevertheless,

suggested that jury coercion in a state trial can violate due process. *See Lowenfield* v. *Phelps*, 484 U.S. 231, 241 (1988). Absent more specific guidance it's probably safest to assume it does. But in deciding how bad jury coercion is -- and how much leeway to allow states in dealing with apparently hung juries -- we must keep in mind the teachings of cases like *Johnson, Williams* v. *Florida*, 399 U.S. 78 (1970) (12-person jury is not a constitutional requirement), and *Cupp* v. *Naughten*, 414 U.S. 141 (1973) (jury instruction universally condemned in federal courts is not unconstitutional), which guarantee states a good deal of latitude in conducting jury trials.

B. Even if we assume jury coercion violates due process, we must next ask whether what happened here was coercive. Ever since the Supreme Court's ipse dixit in *Brasfield* v. *United States*, 272 U.S. 448 (1926), the federal courts have taken it as an article of

faith that a judicial inquiry into the jury's division is coercive. But *Brasfield* didn't explain why it found this practice coercive nor is the reason immediately apparent. After all, asking the jury how it's divided carries with it no explicit message; it exhorts the jurors to do nothing at all. I suppose the inquiry could be understood as denoting some judicial impatience, perhaps some veiled suggestion that jurors in the minority give in to their peers. *Brasfield's* determination that holdout jurors will perceive and be swayed by such a hidden message is less law than psychology, more a guess than a fact. One could conclude just as easily that the inquiry is not coercive because the jury will read nothing into it.

A number of states take this view. California is but one of seven states to have determined that a judicial inquiry into the jury's division is noncoercive and entirely appropriate. *See State* v. *Keaulana*, 784 P.2d

328 (Haw. 1989); *State* v. *Jones*, 641 P.2d 708 (Wash. 1982); *State* v. *Morris*, 476 S.W.2d 485 (Mo. 1971); *Dunford* v. *State*, 614 P.2d 1115 (Okla. Crim. App. 1980); *Sharplin* v. *State*, 330 So. 2d 591 (Miss. 1976); *State* v. *Rickerson*, 625 P.2d 1183 (N.M. 1981). To this group, two other states can be added that also seem to approve the practice. *See Odom* v. *State*, 682 S.W.2d 445, 448 (Tex. Ct. App. 1984) (defendant "has not cited a Texas case, nor have we found one, which makes the mere inquiry as to the numerical division of the jury reversible error per se"); *State* v. *Schamburge*, 344 So. 2d 997, 1001 (La. 1977) ("The trial judge did no more than make a general inquiry as to prospects for a verdict and reminded the jury that ten of the twelve had to agree upon a verdict.").

Another group of states -- seven by my count -- condemns the practice summarily. *See Gumer* v. *Commonwealth*, No. 85-CA-1923-MR (Ky. Ct. App. April 25, 1986); *Graham* v. *State*, 601

A.2d 131 (Md. 1992); *Hyman Reiver & Co.* v. *Rose*, 147 A.2d 500 (Del. 1958); *People* v. *Wilson*, 213 N.W.2d 193 (Mich. 1973); *Rodriguez* v. *State*, 559 So.2d 678 (Fla. Ct. App. 1990); *Kersey* v. *State*, 525 S.W.2d 139 (Tenn. 1975); *State* v. *George*, 711 P.2d 1379 (Mont. 1986). They rely on *Brasfield* or a closely analogous rationale.

An additional eleven states have addressed the issue but do not have a clear-cut position. Among them are states like North Carolina, which find that "[s]uch inquiries are not inherently coercive . . . ." *State* v. *Bussey*, 361 S.E.2d 564, 567 (N.C. 1987). States like Illinois and Arizona disapprove the inquiry but consider it harmless. *People* v. *Craddock*, 516 N.E.2d 1357, 1362 (Ill. App. Ct. 1987); *People* v. *Kirk*, 394 N.E.2d 1212, 1218 (Ill. App. Ct. 1979); *State* v. *Roberts*, 642 P.2d 858, 861 (Ariz. 1982). A substantial number mention, but make no adverse comment on, the trial

judge's inquiry into the jury's division, and focus instead on supplemental *Allen*-type instructions. *See State* v. *Marsh*, 490 P.2d 491, 501 (Or. 1971); *Hardin* v. *State*, 284 S.W.2d 111, 114 (Ark. 1955); *Black* v. *State*, 341 S.E.2d 436 (Ga. 1986); *State* v. *Anderson*, 78 N.W.2d 320, 326-27 (Minn. 1956). Some states adopt a balancing approach, considering the inquiry as part of a broader question of coercion. *Richardson* v. *State*, 508 So.2d 289, 293-94 (Ala. Crim. App. 1987); *People* v. *Austin*, 523 P.2d 989, 993-94 (Colo. 1974); *State* v. *Cornell*, 266 N.W.2d 15, 19 (Iowa 1978); *White* v. *State*, 603 P.2d 1063, 1065 (Nev. 1979).

In determining whether a particular state court procedure violates due process, it's highly relevant whether that state is alone in its view. While a deviation from the norm doesn't automatically offend the Constitution, failure to follow the collected wisdom of other American jurisdictions can raise doubts

about whether the procedure is consistent with due process.[3] The Supreme Court's analysis in *Beck* v. *Alabama*, 447 U.S. 625 (1980), illustrates this point. *Beck* held that the defendant in a capital trial is entitled, as a matter of due process, to a lesser included offense instruction. The Court reasoned that "the nearly universal acceptance of the rule in both state and federal courts [as a matter of statutory or common law] establishes the value to the defendant of this procedural safeguard." *Id.* at 637. There is no such universal agreement that a judicial inquiry into a jury's division is coercive. The majority's assumption to the contrary -- which lies at the heart of its ruling -- is without support.

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3. The converse isn't necessarily true; a procedure might violate due process even though a substantial number of states follow it. Yet, in determining whether an inquiry into numerical division is coercive, it surely matters that a significant number of state supreme courts have considered the procedure and held it isn't.

C. Even assuming the judge's inquiry into the jury's division and his related comments were coercive, we must next ask *how* coercive. My colleagues recognize that "coercion must be more severe to constitute a violation of due process than to invoke our supervisory powers," Maj. op. at 13775, but they then stand this admonition on its head. The cautionary part of the *Allen* charge -- the absence of which the majority sees as the great failing here -- is designed to offset the coercive part of the charge. Thus, in order to vacate a state conviction for failure to give a cautionary reminder, the judge's actions here had to be more coercive than the dynamite part of the *Allen* charge.

By any standard, what happened here -- if it was coercive at all -- was much less coercive than the typical *Allen* charge, where the trial judge looks the holdout jurors in the eye and says:

There is no reason to think that

this case could be better tried or that another jury is better qualified to decide it. It is important therefore that you reach a verdict if you can do so conscientiously. Therefore, if it looks at some point as if you may have difficulty in reaching a unanimous verdict and if the greater number of you agreed on a verdict, the other jurors may want to ask themselves about the basis for their feelings when a substantial number have reached a different conclusion. You should therefore . . . not hesitate to reconsider your views from time to time and to change them if you are persuaded that this is appropriate. It is important that you attempt to return a verdict . . . .

United States v. *Ajiboye*, 961 F.2d 892, 893

n.1 (9th Cir. 1992).

Contrast what happened here: The trial judge asked the jury to tell him how badly they were split and whether there'd been any movement. His comments were relatively mild, more by way of explanation than exhortation. After the first inquiry, when he learned the jury was moving toward unanimity, the judge said: "Well, that's what's important to me because of the nature of the type of case. I want to find out that there has been movement." His comment after the second inquiry was entirely neutral: "All right. Due to the fact we have had that type of movement, I would request, then, to finish the rest of today and see where we are at that point in time. All right? Okay."

What happened here simply is not on a par with -- let alone more coercive than -- the dynamite portion of the *Allen* charge. The majority errs even according to the standard it has set for itself.

D. Even were we to adopt the majority's approach today, we would have no business applying it retroactively to petitioner or to any other state prisoner whose conviction has become final. The Supreme Court in *Teague* v. *Lane*, 489 U.S. 288 (1989) (plurality opinion), held that were the federal courts adopt a new rule as a concomitant of due process, the rule must -- except in rare cases -- be applied only prospectively.[4/] The reasons for this are amply demonstrated by the case before us: What the trial judge did here wasn't an aberration; he followed a practice the California Supreme Court had approved repeatedly. Giving today's rule retroactive application will have a profound and

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4. There are two exceptions to this general rule: if the rule places "certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe;" or if it requires the observance of "those procedures that . . . are `implicit in the concept of ordered liberty.'" 489 U.S. at 307 (citations omitted). It goes without saying that neither applies here.

unsettling effect on hundreds of convictions entered by the courts of California and other states in this circuit. In many cases, there will be no hope of retrying the defendants. Retroactive application of the new rule thus significantly impairs these states' legitimate interests in maintaining convictions secured through procedures their courts reasonably believed conformed with due process.

That the rule the majority adopts is new can hardly be doubted. No federal court -- no court anywhere -- has held that a state judge's inquiry into a jury's numerical division is sufficiently coercive to require an *Allen*-type cautionary instruction. The only case the majority cites, *Jones* v. *Norvell*, 472 F.2d 1185 (6th Cir. 1973), involved not an inquiry as to division alone but, as my colleagues acknowledge, an instruction that "it was [the jury's] duty to reach a verdict." Maj. op. at 13777. Reliance on *Jones* is particularly misplaced in

light of the Sixth Circuit's own limited reading of it in *Williams* v. *Parke*, 741 F.2d 847 (6th Cir. 1984). The *Williams* court confronted a situation far more egregious than that here: a state trial court that had not only inquired into the jury's division, but given a truncated *Allen* charge -- one that was all coercion and no cautionary reminder. *Id.* at 849, 851; *see also id.* at 853 (Contie, J., dissenting). The court distinguished *Jones* on the ground that, "in *Jones*, the trial judge determined not only the jury breakdown, but also the majority's inclination." *Id.* at 851. In addition, "the judge in *Jones* . . . wrongly asserted that the twelve people of the jury 'are the only ones' who could reach a verdict in the case, thus appearing to assert the impossibility of retrial." *Id.* at 851-52.

Sixth Circuit case law can more fairly be characterized as conflicting with the majority's opinion than supporting it. If the inquiry as to division plus the coercive

portion of the *Allen* charge didn't violate due process in *Williams*, the trial judge's neutral inquiries and oblique comments here surely did not.

Other federal circuits have uniformly rejected the kind of claim the majority sustains here. *Ellis* v. *Reed*, 596 F.2d 1195 (4th Cir. 1979), dealt with a situation where the judge had asked about the jury's division, and was told "eleven to one." He then gave a fairly strong version of the *Allen* charge, reminding the jurors that if they could not agree "the time of the Court will again have to be consumed in the trial of this action;" that "it is your duty to try to reconcile your differences and to reach a verdict;" that "a mistrial will mean that another jury will have to be selected to hear this case and evidence again; and it's long and complicated;" and finally that "I want to emphasize the fact that it is your duty to do whatever you can to reason this matter over as reasonable men and

women and attempt to reconcile your differences . . . ." *Id.* at 1196. The jury reached agreement in eight minutes. *Id.* By any standard, the coercion in *Ellis* was far more severe than anything that happened here.

Although the state trial judge did include a brief cautionary instruction, the approach of *Ellis* surely diverges from that of the majority here. *Ellis* grounded its analysis on the Supreme Court's rulings in *Johnson*, *Williams* and *Cupp* and concluded that these are matters that should be left to the state courts:

> We are of the opinion that the injury is essentially procedural in nature, absent any overt coercion upon the minority jurors. In any event, the jury knew how it was divided . . . . [W]e feel that under the principles of federalism the decision whether to allow the inquiry is best left to the

> supervising state court. Indeed, we have expressed the opinion that there is some value to the inquiry in a federal case when the trial judge is deciding whether to declare a mistrial or otherwise excuse the jurors for dinner.

Id. at 1200. Nothing in the Fourth Circuit's opinion paves the way for our ruling today.

The Seventh Circuit took a similarly narrow view of the federal prerogatives in this area. In *United States ex rel. Kirk v. Director, Dept. of Corrections*, 678 F.2d 723 (7th Cir. 1982), the court confronted the petitioner who'd been the defendant in *People v. Kirk*. *See* p. 13783 *supra*. In *Kirk*, the Illinois Court of Appeals held that the inquiry into jury division was error but harmless. The Seventh Circuit characterized the case as involving an inquiry into jury division followed by a modified *Allen* charge, although neither its opinion nor that of the

Illinois appellate court discloses the exact nature of the charge.[5] The Seventh Circuit rejected the argument that an inquiry as to jury division was inherently coercive; the court didn't focus on whether the trial judge reminded the jurors of their duty not to give up honestly held beliefs. Instead, the court held that the inquiry had to be considered in light of all the circumstances of the case, and that the defendant had shown nothing to suggest the inquiry was coercive. *Kirk* surely does not foreshadow the result here for purposes of *Teague*.

The Eighth Circuit dealt with the issue in *Cornell* v. *State*, 628 F.2d 1044 (8th Cir. 1980), reviewing the ruling of the state court

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5. *People* v. *Kirk* says that the trial judge gave a *Prim* instruction. In *People* v. *Prim*, 289 N.E.2d 601 (Ill. 1972), the Illinois Supreme Court approved the use of the ABA recommended instruction in lieu of the standard *Allen* charge. The ABA instruction contains a milder form of the *Allen* dynamite charge, as well as a cautionary reminder. *Id.*

in *State* v. *Cornell*, 266 N.W.2d 15 (Iowa 1978). *See* p. 13783 *supra*. In *Cornell*, the trial judge asked how the jury was divided after more than 15 hours of deliberation, and was told 7 to 5. At that point, the trial court gave a lengthy *Allen*-type charge that can best be described as 95% dynamite and 5% caution.[6/] The Eighth Circuit denied relief,

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6. The only portion of the instruction which can be deemed cautionary is the following phrase: "[W]hile this verdict must be the conclusion of each juror and not a mere acquiescence of the jurors in order to reach agreement . . . ." *Cornell*, 628 F.2d at 1046. This was sandwiched between a variety of exhortations such as: "A proper regard for the judgment of others will greatly aid us in forming our own judgment," and "there is no reason to think a jury better qualified could ever be chosen," and "if the members of the jury differ in their views of the evidence, such difference of opinion should cause them all to scrutinize the evidence more closely and to reexamine the grounds of their opinion," and "your duty is to decide the issues of fact which have been submitted to you, if you can conscientiously do so," and "you should lay aside all mere pride of opinion and should bear in mind that the jury room is no place for espousing and maintaining in a spirit of controversy."

noting that "neither the inquiry nor the *Allen* charge, nor the two in combination, was coercive of the jury's ultimate verdict of guilty." *Cornell*, 628 F.2d at 1048. *Cornell*, like *Ellis*, is difficult to square with our ruling today and is arguably in direct conflict. It certainly in no way presages our decision for purposes of Teague.

Finally, there's our prior ruling in *Locks* v. *Sumner*, 703 F.2d 403 (9th Cir. 1983), which involved an inquiry as to numerical division, apparently not followed by any comment from the trial judge. *Id* at 405 n.1. We upheld the conviction; citing *Cornell*, *Ellis* and *Cupp*, we concluded:

> Here, the circumstances in which the inquiry was made do not persuade us that the jury was in any way coerced: The jury was about to be dismissed for the weekend and the judge may have been wondering whether it was close to agreement,

> making it best to continue deliberations; he made a simple and, on its face, uncoercive inquiry; he did not ask whether the jurors in the majority were for acquittal or a guilty verdict; the judge did not follow the inquiry with any statement imploring the jury to come to a decision; and the jury was not sent back to continue deliberations, but was dismissed for the weekend. We therefore affirm the district court on this issue.

Id. at 407. If *Locks* is not actually in conflict with our opinion today, it surely contains no suggestion, no hint, that an *Allen*-type cautionary reminder is required whenever the judge asks the jury how it's divided.[7]

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7. Also relevant is *United States* v. *Akbar*, 698 F.2d 378 (9th cir. 1983), cited in *Locks*. In *Akbar*, the district judge conducted an unusual jury poll to determine

The long and the short of it is that today's decision is out of step with those of other federal courts. It's the first case anywhere that equates a neutral inquiry into the jury's division with the dynamite portion of an *Allen* charge; it is the first federal court to reverse a state conviction under these circumstances. If *Teague* does not bar retroactive application in these circumstances, it has no meaning at all.

E. The Supreme Court has repeatedly directed the federal courts to stick to their limited role in reviewing state convictions. *See, e.g., Estelle* v. *McGuire*, 112 S. Ct. 475, 480 (1991) ("[W]e reemphasize that it is not the province of a federal habeas court to reexamine state court determinations on state

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which jurors wanted certain testimony reread. During the course of that procedure, the judge learned not only that the jury was split 11 to 1, but also the identity of the holdout juror. There was no cautionary instruction, yet the court reluctantly affirmed. *See also id.* at 380-81 (Kennedy, J., concurring).

law questions."); *see also Pulley* v. *Harris*, 465 U.S. 37, 41 (1984). But, as this case illustrates, many federal judges find it difficult to separate their role of supervising the federal courts from their narrower role of policing possible constitutional violations in state habeas cases. Nor is this an isolated instance. In two other recent habeas cases, my colleagues casually equated federal rules of procedure with constitutional requirements. *See Henry* v. *Estelle*, 993 F.2d 1423 (9th Cir. 1993); *McKinney* v. *Rees*, 993 F.2d 1378 (9th Cir.1993). *Henry* is a particularly egregious example, containing, as it does, the following passage: "This inference is impermissible. Fed.R.Evid. 404." *Henry*, 993 F.2d at 1427. I fear a pattern is emerging where federal judges create constitutional rules that allow them to remake state procedure in the federal image.

As Chief Justice Burger once noted, "[w]e

should be cautious about constitutionalizing every procedural device found useful in federal courts, thereby foreclosing the States from experimentation with different approaches which are equally compatible with constitutional principles." *Crist* v. *Bretz*, 437 U.S. 28, 39 (1978) (Burger, C.J., dissenting). If the current trend continues, the concept of due process will disappear altogether, to be replaced by the Federal Rules of Criminal Procedure. *See Williams*, 399 U.S. at 136-138 (Harlan, J., concurring in result). This is not, I respectfully suggest, a wonderful idea.

CONCLUSION

Dealing with an apparently deadlocked jury is not easy. Reasonable jurists certainly might respond in more than one way. My colleagues today foreclose the State of California from pursuing the approach it prefers merely because this approach doesn't conform to the mold cast by the federal

courts. By applying the decision retroactively, the majority compounds the damage. I dissent.

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Filed: January 20, 1994

GREGORIO JIMENEZ, Petitioner-Appellant, v. E.R. MYERS, Warden, ATTORNEY GENERAL OF CALIFORNIA, Respondents-Appellees.	)	No. 91-56476 USDC No. CV 90-0419-GLT ORDER

Before: BROWNING, HUG, and KOZINSKI, Circuit Judges

A majority of the panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R.

App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GREGORIO JIMINEZ, Petitioner, vs. E. R. MYERS, Respondent.	No. SACV 90-419 GLT(RWR) JUDGMENT

Pursuant to the Order of the Court adopting in part and rejecting in part the findings, conclusions, and recommendations of the United States Magistrate Judge,

IT IS ADJUDGED that the petition for Writ of Habeas Corpus is DENIED.

DATED: May 7, 1991

GARY L. TAYLOR
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GREGORIO JIMINEZ, Petitioner, vs. E. R. MYERS, Respondent.	No. SACV 90-419 GLT(RWR) ORDER ADOPTING IN PART AND REJECTING IN PART REPORTS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE, AND DENYING WRIT OF HABEAS CORPUS

Pursuant to 28 U.S.C. §636(b)(1)(C), the Court has reviewed the Petition, all of the records and files herein, and the attached Reports and Recommendations of the United States Magistrate Judge. Objections to the Report and Recommendation have been filed herein. Having made a de novo determination of those portions of the Report and Recommendation to which objection has been made, the Court adopts in part and rejects in part the findings and conclusions contained therein, as follows:

I. Preliminary matters.

The Court concurs with and adopts the Magistrate Judge's statement of preliminary matters, Petitioner's Contentions, and Background (Report and Recommendation, pages 1-6).

II. Effect of State Reviewing Court's Findings.

The Court concurs with and adopts the Magistrate Judge's statements in his Final Report and Recommendation (pages 2-3) rejecting Respondent's contention that the state reviewing court's finding of no coercion is binding on Petitioner. The state court finding was a mixture of law and fact, and is not binding on this Court.

Although the state appellate court's conclusion might ordinarily be entitled to great weight, that rule will not be applied here. In its opinion, the state appellate court duly referred to the two instances of jury polling which occurred, but made only

passing reference to what the judge said to the jury after the polls. As correctly noted by the Magistrate Judge, it is the polling, together with the judge's comments afterward, that raise the question of potential coercion. The failure of the state reviewing court to more fully quote and evaluate those comments makes the state court's conclusion of limited value of this Court.

III. Potential Polling Coercion.

The Court concurs with the Magistrate Judge that, under present interpretation of Supreme Court cases, per se reversal is not required if a state court jury is polled on how they stand. Instead, the polling and inquiry or instructions of the judge must be viewed in light of their full context, and not in isolation, to determine if there was coercion in light of all the circumstances. Locks v. Sumner, 703 F.2d 403, 406-407 (9th Cir. 1983).

The Magistrate Judge has carefully quoted

the full context of the polling and judge's remarks, and has correctly stated the circumstances surrounding those events. The Court concurs with and adopts that statement of events.

Based upon those events, the Magistrate Judge concluded: "Given the context of the court's remarks, `substantial movement' that was `important to him' can only reasonably be interpreted in the sense that the movement should continue in the same direction toward unanimity" (Report and Recommendations, page 10, lines 8-11). Upon reviewing the entire context of the polling and judge's remarks, this Court cannot concur with that conclusion.

In this Court's view, the effect of the judge's questions and remarks was to learn in a neutral way from the jury if further deliberations would be of use to them. From the change in votes, the judge ascertained that the passage of time and further deliberations had led to changes in position.

Such changes are a normal part of the jury deliberation process. The comment that "substantial movement" was "important to him" was merely the judge's confirmation that fruitful deliberation was still going on.

In sending them back to "finish the rest of today and see where we are at that point in time, "this Court finds no coercion on the last juror to cave in. If anything, the minority juror would have known that he or she was <u>not</u> under pressure, because the case would likely end in a hung jury if the deadlock continued for a few more hours.

Considering all the circumstances, the Court must conclude there is no showing that the combination of jury polling and judge's comments coerced the jury or deprived Petitioner of a constitutional right. Accordingly, IT IS ORDERED that the Writ of Habeas Corpus Petition filed herein is DENIED.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the

Reports and Recommendations and the Judgment herein by United States mail on Petitioner and counsel for Respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: May 7, 1991.

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GARY L. TAYLOR
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GREGORIO JIMINEZ, Petitioner, vs. E. R. MYERS, Respondent.	No. SACV 90-419 GLT(RWR) FINAL REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE ON A PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

This Final Report and Recommendation and the attached Report and Recommendation are submitted pursuant to the provisions of 28 U.S.C. §636(b)(1)(B) and General Order 194 of the United States District Court for the Central District of California.

On March 13, 1991, the Clerk filed Notice of Filing of Magistrate Judge's Report and Recommendation and the Lodging of Proposed Judgment, which was served on the parties together with copies of said Report and Recommendation.

Respondent has timely filed his objections to the Report and Recommendation. The Magistrate Judge has carefully read and considered the objections, but he is not persuaded to modify his recommendation in any respect.

Respondent's objections can be condensed into one assertion; that the factual findings of the state reviewing court are binding against Petitioner.

In a habeas review, the federal court must presume that the state appellate's court factual findings are correct unless one of seven circumstances provided for in 28 U.S.C. §2254(d) is present or if the state court finding is not fairly supported by the record. Sumner v. Mata, 455 U.S. 591, 592, 102 S.Ct. 1303, 1304, 71 L.Ed.2d 480 (1982) (per curiam). Section 2254(d) applies only to questions of "`basic, primary, or historical fac[t].'" Strickland v. Washington, 466 U.S. 668, 698, 104 S.Ct. 2052, 2070, 80 L.Ed. 2d

674 (1984) (quoting Townsend v. Sain, 372 U.S. 293, 309 n. 6, 83 S.Ct. 745, 755 n. 6, 9 L.Ed.2d 770 (1963)). The presumption does not apply to a state court's determination of mixed questions of fact and law. Reiger v. Christensen, 789 F.2d 1425, 1428-29 (9th Cir. 1986). A legal conclusion, such as whether a confession was voluntary, is not entitled to a presumption of correctness. Miller v. Fenton, 474 U.S. 104, 112, 106 S.Ct. 445, 450-51, 88 L.Ed.2d 405 (1985).

Respondent argues that a finding of coercion is necessarily a factual finding and, as such, the presumption in §2254 must apply. No authority for this proposition is presented by Respondent. Respondent likens the case at bar to Patton v. Yount, 467 U.S. 1025, 104 S.Ct. 2885, 81 L.Ed. 2d 847 (1984). In Patton, supra, the Court found that the §2254 presumption applied to a trial court's finding that particular jurors were impartial. In overturning an appellate court finding that

the issue was a mixed question of fact and law, the Court determined that the question was "plainly one of historical fact." Id. at 1036, 104 S.Ct. at 2891, 81 L.Ed.2d 847. However, the determination of impartiality by the trial court in Patton, supra, depended on its observation of the voir dire proceedings and its evaluation of each juror's credibility. Id. at 1033-39, 104 S.Ct. at 2892-93, 81 L.Ed.2d 847. These factual evaluations were the foundation for its finding of impartiality.

In the case at bar, no factual findings underpin the issue of coercion. The state appellate court was presented with a transcript reflecting the trial court's proceedings. From that, it reached the legal conclusion that coercion did not exist. The finding was not factual, but rather was comprised of mixed facts and law. The §2254 presumption does not apply in such cases.

In this due process analysis, the Court

has given the conclusion of the state appellate court great weight. See Culombe v. Connecticut, 367 U.S. 568, 605, 81 S.Ct. 1860, 1880, 6 L.Ed.2d 1037 (1961) (opinion of Frankfurter, J.). Nonetheless, in applying federal constitutional prescriptions, as it must, the court finds that the type of polling used combined with the supplemental jury instructions were coercive. See Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546, 550, 98 L.Ed.2d 568 (1988). The distinction between this unacceptable polling and other, possibly more appropriate types is clear. In the case at bar, the judge polled the jury on the merits, albeit he did not question them on which direction they were favoring. Concurrently, he made encouraging statements indicating that movement in one direction was important to him[1/] and due to the movement

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1. The foreperson noted that "there has been some movement in one direction" and the judge affirmatively responded, saying, "[o]kay. Well that's what's important to

more deliberation may be fruitful.[2/]

IT IS THEREFORE THE FINAL RECOMMENDATION OF THE MAGISTRATE JUDGE that an Order be issued by the Court (1) approving these Reports and Recommendations, and (2) GRANTING the Writ of Habeas Corpus and, (3) ordering Petitioner released from custody arising from his conviction, in San Bernardino Superior Court, Case No. OCR-13455 on November 7, 1988 and the sentence imposed on November 16, 1988, unless the Petitioner is granted a new trial within 60 days from the date judgment is entered herein.

Dated: 4/8/91

RONALD W. ROSE
UNITED STATES MAGISTRATE JUDGE

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me..." (RT, 440).

2. The judge told the jury that "[d]ue to the fact that we have had that type of [substantial] movement, I would request, then, to finish the rest of today..." (RT, 449).

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GREGORIO JIMINEZ, Petitioner, vs. MYERS, Respondent.	No. SACV 90-419 GLT(RWR) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE ON A PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

This Report and Recommendation is submitted pursuant to the provisions of 28 U.S.C. §636(b)(1)(B) and General Order 194 of the United States District Court for the Central District of California.

Petitioner, represented by counsel, commenced this action on June 5, 1990 by filing a Petition for Writ of Habeas Corpus by a Person in State Custody. Both a Return and Traverse have been timely filed. Petitioner is incarcerated in the California Correctional Training Facility at Soledad, California.

Petitioner was convicted in the San Bernardino County Superior Court on November 7, 1988 of attempted murder (Cal. Penal Code §§664/187), use of a firearm (Cal. Penal Code §12022.5) and infliction of great bodily injury (Cal. Penal Code §12022.7). The court sentenced Petitioner to ten years. (Petition 3).

Petitioner filed a direct appeal to the California Court of Appeals, Fourth Appellate District, which affirmed the conviction on December 8, 1989. He then petitioned the California Supreme Court for review of the issue presented in the case at bar. The petition was denied on March 21, 1990. Petitioner has, therefore, pursued and exhausted his state remedies. See Roman v. Estelle, 917 F.2d 1505 (9th Cir. 1990).

PETITIONER'S CONTENTIONS

Petitioner alleges that the trial court judge committed constitutional error by inquiring into the numerical breakdown of the

jury votes and requiring continued deliberation after they had announced that they were deadlocked.

BACKGROUND

The jury began deliberation on the morning of November 3, 1988. At 4:00 that afternoon the trial court judge received a note, signed by the jury's foreman stating, "[w]e are unable to reach a verdict and feel strongly that we would not be able to reach a verdict." (Reporter's Transcript [hereafter RT] 347). The judge consulted with counsel, outside the presence of the jury, and defendant's counsel offered that in his experience, "[i]n a case like this with this type of emotions and feelings, if they're deadlocked now, they're rarely going to change." (RT 438).

The jury was then allowed in and the court quizzed the foreman about the votes:

The Court: Without telling me which direction, just numerically,

how did it start, and what was it on the last?

The Foreman: [I will] Try to tell you numerically without [indicating] either way. To the best of my recollection, it started out about maybe seven to five, eight to four. Went to nine to three. All right. To back up, this morning, nine, two, and one.

* * *

The Court: All right. So you did have -- how about in between, nine-two and one and then nine-three, has there been movement one way or the other.

The Foreman: Nine-one-two, I would say at this point. And yes, there has been some movement in one direction.

The Court: Okay. Well, that's what's important to me because of

the nature of the type of case. I want to find out that there has been movement. (RT 440) (Emphasis added).

The court then allowed the jury to leave for a three day weekend. The jury returned on Monday morning, November 7, 1988. Deliberations resumed and at 2:03 that afternoon, the court received a second note, "[w]e are in an impasse and request further direction." (RT 447). In response, the judge decided to "bring the jurors out, [to] see if there's been any substantial movement at all." (RT 447-48). The following then occurred:

> The Court: Okay. Now last Friday I inquired of you as to whether or not there had been any movement by the jury. So I'll ask you that same question again with the understanding, all I want is numbers, not which direction that you're at. How many votes have you

taken since last Friday?

The Foreman: Two or three. Two.

The Court: Two more?

The Foreman: Uh-huh

The Court: What's the latest?

The Foreman: Eleven-one

The Court: So there has been, then, substantial movement since the last time.

The Foreman: Yes.

The Court: All right. Due to the fact we have had that type of movement, I would request, then, to finish the rest of today and see where we are at that point in time. All right? Okay.

(RT 448-49). (Emphasis added).

Defense counsel then approached the bench and, outside the presence of the jury, told the court that he thought the proper inquiry was to ask the jury whether they felt that further deliberation would cause a change in

their position. He explained his rationale by noting:

> Because, just for [sic] hypothetically, if there's one person in there that's for not guilty, it's putting them on a tremendous amount of pressure, and I don't think they should be subjected to that pressure. If that person is firm in their verdict, we're not getting deliberations. We're just getting pressure.

(RT 449-50).

The Court took note of defense counsel's comments and stood firm in allowing the continued deliberation because there had been "substantial movement since Friday... [and two hours of deliberation] is not undue pressure on anyone, in my estimation." (RT 450). Two hours later, the jury returned a guilty verdict.

DISCUSSION

Petitioner argues that the trial judge's polling and supplemental statements unfairly coerced the jury into reaching a verdict and thus he was deprived of due process. Courts have long struggled with the propriety of polling jurors before the verdict is rendered and various standards have been suggested. See Annot., 77 A.L.R.3d 769 (1977).

This Court examines the polling and surrounding events to determine whether, under the totality of circumstances, the result was coercive. The main factors considered are the type of polling used and the coercive nature of any supplemental jury instruction. Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546, 550, 98 L.Ed.2d 568 (1988); Jenkins v. United States, 380 U.S. 445, 446, 85 S.Ct. 1059, 1060, 13 L.Ed.2d 957 (1965) (per curiam). Although the Court does not evaluate the instructions in a vacuum, the analysis focuses on them to determine whether they

infected the entire trial so that the resulting conviction violates due process. Cupp v. Naughten, 414 U.S. 141, 147, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973).

Respondent relies on Lowenfield, supra, for the proposition that per se reversal is no longer required in cases such as the one at bar. The Court agrees. The analysis, however, cannot end there. In fact, the Lowenfield court notes that the jury polling, especially when combined with improper jury instructions, presents the potential danger of coercion. Id at 239-40, 108 S.Ct. at 552. The Court held that the polling in Lowenfield was constitutional. The polling used in that case, however, is distinguishable from the type in the case at bar. Id. As Petitioner points out, the Lowenfield trial judge's inquiry was not on the merits. Rather, the judge specifically asked the jurors if they felt that any more deliberations would enable them to arrive at a verdict. Id. at 237, 108

S.Ct. at 549. This is in stark contrast to the polling that occurred in the instant case. Here the trial judge asked specifically for the number of votes taken and the results of each voting event.[1/] Defense counsel recommended the Lowenfield approach to the polling of the jury, that is, to center the inquiry on whether they felt more deliberation would be fruitful; the judge refused the suggestion. (RT 449-50).

There is clear distinction between the two alternative polling techniques. When polled on the benefit of further deliberations, the fact that people disclose their view has no effect on their upcoming vote on the merits. People in the majority on the merits are no more likely to conclude that further deliberation would be fruitful than people in the minority, and vice versa.

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1. The judge specifically asked the jury to refrain from telling him the direction, guilty or not guilty, that the vote leaned.

Repeated polling on the merits has a dramatically different effect. The Supreme Court dealt with identical type polling in Brasfield v. United States, 272 U.S. 448, 47 S.Ct. 135, 71 L.Ed. 345 (1926), the case that the Lowenfield decision ultimately narrowed. The Court noted that merit polling, without more, generally is coercive.

> It can rarely be resorted to without bringing to bear in some degree, serious, although not measurable, an improper influence upon the jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded. Id. at 450, 47 S.Ct. at 136.

The fact that the judge did not discover or request the foreman to quantify the number of jurors in the majority versus the number in the minority regarding guilt or non-guilt is of no consequence. Id. at 449, 47 S.Ct. at 137.

135. Merit polling, standing alone, supports a finding of coercion.

An additional indication of coercion is provided by counsels' agreement to accept the jury's second stated impasse as an indication that it was hopelessly deadlocked.

Notwithstanding this agreement, the judge decided to bring the jurors out for the expressed purpose of determining if there had been any substantial movement. (RT 447-48). This must be contrasted with the Lowenfield analysis, in which the Court noted that defense counsel neither objected to the polls nor the supplemental instruction, lending credence to the decision that coercion did not exist.[2/] Lowenfield, 484 U.S. at 240, 108 S.Ct. at 552.

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2. In the Lowenfield decision the Court implied that the likelihood of potential coercion would have been buttressed had defense counsel objected "on the spot". Lowenfield, 484 U.S. at 240, 108 S.Ct. at 552. In the case at bar, defense counsel did object to the type polling being utilized and suggested an alternative.

Next, the Court analyzes the judge's comments and instructions themselves. His initial and proper instruction to the jurors before they began their deliberation was, in pertinent part, as follows:

> Each of you must decide the case for yourself but should do so only after a discussion of the evidence and the instructions with the other jurors.
>
> You should not hesitate to change an opinion if you are convinced it is erroneous. However, you <u>should not be influenced to decide any question in a particular way because a majority of the jurors or any of them favor such a decision</u>.

(RT 426-27) (Emphasis added).

Nonetheless, after the jury reached their first impasse, the judge determined that the voting was progressing, seven-five,

eight-four, nine-three, and told the jury to return to deliberate because such movement was important to him. (RT 440). After the jury reached a second and final impasse, and the poll was eleven-one, the judge specifically asked if there had been substantial movement in the vote. Given the context of the court's remarks, "substantial movement" that was "important to him" can only reasonably be interpreted in the sense that the movement should continue in the same direction toward unanimity. The coercion on the sole juror is apparent. The judge desired a verdict, the jury was moving in that direction, and then, the judge allowed the majority two more hours to convince the lone holdout; it was simply a matter of time.

As intended, the jury returned with its verdict quickly after restarting deliberation; this creates a strong inference of coercion. United States v. United States Gypsum Co., 438 U.S. 422, 462, 98 S.Ct. 2864, 2886, 57 L.Ed.2d

854 (1978).

CONCLUSION

After thoroughly reviewing the entire file and in considering all of the events in context, the Magistrate Judge concludes that the jury polling, coupled with the judge's supplemental instruction, was sufficiently coercive to violate Petitioner's due process right to a fair trial.

IT IS THEREFORE RECOMMENDED that the Court issue an Order (1) approving the adopting of this Report and Recommendation as the findings of fact and conclusions of law herein, (2) GRANTING the Writ of Habeas Corpus and, (3) ordering Petitioner released from custody arising from his conviction, in San Bernardino Superior Court, Case No. OCR-13455 on November 7, 1988 and the sentence imposed on November 16, 1988, unless the Petitioner is granted a new trial within 60 days from the date judgment is entered herein.

Dated: March 11, 1991

RONALD W. ROSE
UNITED STATES MAGISTRATE JUDGE

NOT FOR PUBLICATION

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

Filed: December 8, 1989

PEOPLE OF THE STATE OF CALIFORNIA,	)	E006239
Plaintiff and Respondent,	)	Super. Ct. No. OCR-13455
v.	)	
GREGORIO LOPEZ JIMENEZ,	)	OPINION
Defendant and Appellant.	)	

APPEAL from the Superior Court of San Bernardino County. DuYane M. Lloyd, Judge. Affirmed.

Appellate Defenders, Inc., Marjorie F. Cohn, and Howard C. Cohen, under appointment by the Court of Appeal, for Defendant and Appellant.

John K. Van de Kamp, Attorney General, Richard B. Iglehart, Chief Assistant Attorney General, Harley D. Mayfield, Senior Assistant

Attorney General, Raquel M. Gonzalez and Robert P. Whitlock, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Gregorio Jimenez of attempted murder (Pen. Code, §§ 664/187), during which he used a firearm (Pen. Code, § 12022.5) and inflicted serious bodily injury (Pen. Code, § 12022.7). He was sentenced to prison and appeals claiming jury instruction error and judicial misconduct.

FACTS

Jimenez and his cousin, the victim, had had a romantic relationship. Jimenez wanted to marry her, but she wanted to terminate the relationship. Jimenez went to her house and they argued about some papers but eventually resolved their dispute. When the victim reiterated her desire to end their affair, Jimenez threatened to "mess her up" and he said if he couldn't have her, no one else would. He pulled a gun out of his sock and pointed it at her telling her it had two

bullets for her and two for him, and that they were both going to die. Suddenly, the victim's son came in the room, so Jimenez put the gun in his back waistband. Jimenez left through the front door as the victim's son cried and yelled at him. The victim, who was at the front door, asked Jimenez if he had come over to upset her son. Jimenez responded, "No, I came over for this." At that, he fired the gun into the air, then aimed and shot twice at the victim, who had retreated inside, closing the door. He continued firing until he shot himself in the forehead.

Jimenez contended at trial that he had brought the gun to the victim's home because he was trying to sell it to her neighbor. When the sale did not go through, he put it in his sock because he was afraid to leave it in his car trunk, which did not lock. He said he threatened her with the gun to scare her because she had been "talking . . . rather

strong" to him about the termination of their relationship. He claimed the victim's son called him a bad name and the victim accused him of bringing the gun so he could shoot her. He maintained the conversation then returned to the issue of the papers, which was resolved. He walked out the front door, with the gun in his back waistband. As he neared his car, she told him to go "f--- himself." He took the gun out and fired one shot into the air "to scare her," as she stood at the front door. She closed the door. He claimed he fired another shot into the air, waited until he thought she would be sitting on the couch in the living room and fired two more shots into the door. He said at the time he shot into the door, he was "very angry, and. . . was trying to scare her. [He] felt very much offended." He later testified he didn't "know exactly [whether he] got angry [when she told him what to do with himself.]" He also said he did not know what he was thinking when

he fired into the door, then he claimed his only thought was to scare her, a position he reiterated throughout the remainder of his testimony. He fired the fifth shot into the ground and the sixth, he claims, accidentally hit his forehead. He said he was "very angry . . . very crazy, and . . . affected by the liquor [he had previously consumed]" when he fired the fifth shot.

In argument to the jury, the People maintained that Jimenez committed an attempted murder because he intended to kill the victim when he shot at her. Jimenez, on the other hand, argued that he only intended to scare her, and was, therefore, not guilty of the charged offense.

DISCUSSION

1. Jury Instructions

The jury was given the standard instructions on attempted murder, including the requirement that the People prove beyond a reasonable doubt that Jimenez intended to kill

the victim. Jimenez, as a tactical decision, chose to forego instructions on voluntary manslaughter, with its concomitant concepts of provocation and heat of passion. Jimenez now contends that the jury, sua sponte, should have been instructed that the intent to kill necessary to establish attempted murder may be negated by heat of passion and that his tactical decision to forego instructions on attempted voluntary manslaughter should not foreclose his present claim. We disagree.

Jimenez hinges his argument in large part on *Mullaney* v. *Wilbur* (1975) 421 U.S. 684. In *Mullaney*, the United States Supreme Court held that a Maine law which placed upon the defendant the burden of proving by a preponderance of evidence that he acted in the heat of passion on sudden provocation in order to reduce murder to manslaughter was a violation of the due process clause. The court noted:

"In this country the concept of malice

aforethought took on two distinct meanings: in some jurisdictions it came to signify a substantive element of intent, requiring the prosecution to prove that the defendant intended to kill . . .; in other jurisdictions it remained a policy presumption, indicating only that absent proof to the contrary a homicide was presumed not to have occurred in the heat of passion. . . . [I]n the past half century, the large majority of States have [come to] require the prosecution to prove the absence of the heat of passion on sudden provocation beyond a reasonable doubt." (*Id.* at pp. 695-696.)

The "expansive proceduralist view" (Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence* (1989) 40 Hastings L.J. 457, 465), expressed in *Mullaney*, was heavily criticized (see articles cited therein) and later redefined in *Patterson* v. *New York* (1977) 432 U.S. 197 in such a manner that it is no longer applicable to California's law on

homicide. In *Patterson*, the court upheld as not violative of the due process clause a New York law which placed upon the defendant the burden of proving by preponderance of the evidence that he acted under the influence of extreme emotional disturbance, a form of heat of passion. The court noted:

"[U]nder New York law . . . [t]he death, the intent to kill, and causation are the facts that the State is required to prove beyond a reasonable doubt if a person is to be convicted of murder. No further facts are either presumed or inferred in order to constitute the crime. The statute does not provide an affirmative defense -- that the defendant acted under the influence of extreme emotional disturbance . . . which . . . would reduce the crime to manslaughter, an offense defined in a separate section of the statute. It is plain enough that if the intentional killing is shown, the State intends to deal with the defendant as a murderer unless he

demonstrates the mitigating circumstances. [¶] It seems to us that the State satisfied the mandate of *Winship* that it prove beyond a reasonable doubt 'every fact necessary to constitute the crime with which [Patterson] was charged.' . . . [¶] The Due Process Clause, as we see it, does not put New York to the choice of abandoning [the affirmative defenses to murder] or undertaking to disprove their existence in order to convict of a crime which otherwise is within its constitutional powers to sanction by substantial punishment. [¶] To recognize at all a mitigating circumstance does not require the State to prove its nonexistence in each case in which the fact is put in issue, if in its judgment this would be too cumbersome, too expensive, and too inaccurate." (*Id.* at pp. 205-210.)

The *Patterson* court noted the inapplicability of its holding in *Mullaney*, noting that under Maine law, in contrast to New York's, "malice, in the sense of the

absence of provocation, was part of the definition of [murder]." (*Id.* at p. 216.)

California law is like that of New York rather than Maine. Instructions that heat of passion may negate intent to kill, a concept with which we do not take issue, has never been required *apart from the jury's consideration of the crime of voluntary manslaughter*, an option foreclosed by Jimenez's tactical decision here. Disproving heat of passion is not an element of murder, therefore, there was no sua sponte obligation to instruct on it. We have no quarrel with instructing this jury that if it believed Jimenez acted under heat of passion, he could not have been guilty of attempted murder. We do, however, take issue with Jimenez's desire that this jury be told that he was *thereby also* not guilty of *any* crime. The law is quite contrary. If he acted under heat of passion, he is guilty of attempted voluntary manslaughter -- he is not legally blameless.

To give Jimenez what he wants would require us to allow all criminal defendants to pick and choose for which crimes they wish to run the risk of being convicted. Obviously, this we cannot do.

2. Judicial Misconduct

Two hours and forty-five minutes after the jury began its deliberations, it requested a readback. A little longer than one hour after the readback had been completed, the jurors reported to the court, "We are unable to reach a verdict and feel strongly that we would not be able to reach a verdict." With no objection from either party, the trial court undertook to determine "if there is reasonable movement at this time." It did so by asking the foreperson how many votes had been taken and what their numerical division was, without saying which way the vote was going. She reported that between five and six votes had been taken and her recollection of the division was 7-5, 8-4, 9-3, and 9-2-1.

She added "there has been some movement in one direction." Since it was then late in the afternoon before a long weekend, the court dismissed the jury until the following court day, asking them to deliberate "at least for the morning to see if we have any further movement."

That morning, they deliberated another three hours, during which they asked for printed copies of the jury instructions and for a readback of counsel's arguments, the latter request being denied by the trial court. A half hour after returning from their lunch break, the jury reported, "We are in an impasse and request further direction." Again, without objection, the court decided to bring the jury out and determine "if there's been any substantial movement at all. If there has not been, then I'll have to declare a mistrial." The foreperson reported that there had been two or three votes since the court had last inquired and the last vote was

11-1. She confirmed that there had been substantial movement since then. The court asked the jury to "finish the rest of today and see where we are at that point in time." Two hours later, they reached a verdict.

Penal Code section 1140 prohibits a trial court from declaring a mistrial unless "it satisfactorily appears that there is no reasonable probability that the jury can agree" on a verdict. "The discharge of this responsibility necessarily requires that the court, in cases where the jury has been unable to reach agreement make the indicated determination of 'reasonable probability' and, in cases where in accordance with sound legal discretion [citations omitted] it is determined that such a probability exists, that it take appropriate action to encourage agreement. Thus, the court in such cases may inquire of the jury as to its numerical division without seeking to discover how many jurors are for conviction and how many are for

acquittal." (*People* v. *Carter* (1968) 68 Cal.2d 810, 815; accord, *People* v. *Rodriguez* (1986) 42 Cal.3d 730, 776, fn. 14 ["[A] neutral inquiry into numerical division, properly used, is an important tool in ascertaining the probability of agreement."].) The only limit placed on the inquiry as to numerical divisions is that its results not be used to pressure minority jurors into voting with the majority. (*People* v. *Gainer* (1977) 19 Cal.3d 835, 841, 844-845.) In *People* v. *Sheldon* (1989) 48 Cal.3d 935, the trial court asked the deadlocked jury what its numerical division was. The jury said it was 11 to 1 in favor of the death penalty. The vote was said to be "firm," the deadlock "hopeless." Still, the trial court insisted on questioning individual jurors and when it did, it discovered that there was disagreement as to whether a rereading of the instructions might break the deadlock. The California Supreme Court found this procedure to be non-coercive.

In *People* v. *Cole* (1982) 31 Cal.3d 568, 582, the California Supreme Court held that directing a deadlocked jury to continue deliberations is not impermissible.

Nothing more than the two activities approved by the Supreme Court in *Cole* occurred here. Aside from these considerations, we note that the jury asked for reinstruction and readbacks after initially reporting its deadlock. In the second report, the jurors sought the direction of the trial court, indicating they did not believe the situation was totally hopeless. Once again the crucial inquiry was whether movement had occurred and they were sent back to further deliberate to see if more movement would take place. They had previously been instructed as to the legitimate factors they were to employ in reaching their decision. After the verdict was rendered, they were polled -- each confirmed that guilt was his or her individual verdict. While this was not factually a

complicated or long case, the crucial issue -- Jimenez's intent when he shot the victim -- was not easily discernible, especially in light of the victim's post-shooting conciliatory gestures towards Jimenez and Jimenez's profession of love for her. The jury deliberated less than two days.

We find nothing coercive in the manner in which the trial court determined the probability that the jury could reach a verdict. The court acted merely as a neutral observer, not as a cheerleader for some final determination. There was no error in this regard.

DISPOSITION

The judgment is affirmed.

NOT FOR PUBLICATION.

/s/ Hollenhorst

Acting P.J.

We concur:

/s/ McDaniel
J.

/s/ Dabney
J.